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The Legal Protection of Children's Right to Free and
Compulsory Primary Education in Nigeria:
Problems and Prospects

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Thesis submitted to the School of Law in partial fulfilment of the requirement for the award
of the degree of Doctor of Philosophy of the University of London.

2015

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Abstract

This study explores the important issue of education delivery in Nigeria from within human rights perspectives. It analyses the scope of the right to free and compulsory primary education as laid down and reassured under international human rights law. It peruses the roles played by the respective actors responsible in the process of implementation of the right, including international funding bodies, international human rights agencies, the Nigerian state, regional institutions and the judiciary towards realising this right in Nigeria. The study examines the level of Nigeria's compliance with the right to free primary education, based on the international normative standard by reviewing the extent to which primary education is free and compulsory to all children in Nigeria. It also investigates the barriers to the state's compliance with this right. Given that Nigeria is a state party to all international and regional human rights instruments providing for the right to education, it is deemed necessary to compare the domestic legislation with standards in relevant international and regional human rights instruments for realising the right to education. The study identifies the lacunae in the national laws, the difficulties encountered in the implementation of this important right and the possible ways of addressing the challenges ahead for the full realisation of this right.

The thesis provides an invaluable insight into some of the steps that need to be taken for the right to free and compulsory education to have a significant impact on both policy and practical outcomes in Nigeria. By way of case studies, the thesis draws examples from two other jurisdictions in Africa, namely Ghana and Kenya, where fully free compulsory primary education has been successfully implemented so that Nigeria can derive from their experiences. The thesis offers a theoretical basis on which the assertion that children have a right to free and compulsory primary education may be grounded and an explanation of the social significance of making such an assertion and the need to implement it. It places the international instruments namely; Universal Declaration of Human Rights (UDHR), International Covenant on Economic Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC), and the regional instruments; African Charter on Human and Peoples' Rights (ACHPR) and African Charter on the Rights and Welfare of the Child (ACRWC) within this framework. The principal objective of this study is to argue for the

transformation of the exclusive privilege of education enjoyed currently by few lucky children in Nigeria into a legitimate and legal right to be enjoyed by all children in Nigeria.

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Special thanks to my siblings, Toyin, Mariam, Funlayo, Taiwo and Kehinde for believing in me, and their invaluable support which contributed in many ways towards this work. I most especially express special gratitude to Funlayo, who selflessly shared her resources, home, and love with me throughout the period of my study. Funlayo, I admire and respect you more than I can express. To my 89 year old mum, I say thank you. Her extraordinary inspiration, love, and prayers during my research and writing greatly facilitated the successful completion of this work.

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Namibia

Constitution of Namibia

Nigeria

Child's Rights Act 2003

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Compulsory Free Universal Basic Education Act 2004

Constitution of the Federal Republic of Nigeria 1999

Eastern Region Education Law, 1956 (No 28 of 1956)

Education (Lagos) Act, 1957 No 26 of 1957

Education (Lagos) Ordinance Laws of the Federation of Nigeria & Lagos Cap 56 1958.

Laws of Western Region 1959

Marriage Act Laws of the Federation of Nigeria Chapter 218 1990.

Northern Region Education Law, 1956 (No 17 of 1956)

South Africa

Constitution of the Republic of South Africa 1996

List of Abbreviations

4As	Availability, accessibility, acceptability and adaptability
A C	Appeal Cases
ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	Acquired Immunodeficiency Syndrome
AIR	All India Reporter
All E.R	All England Law Reports
AU	African Union
CADE	Convention against Discrimination in Education
CARE	Cooperative for Assistance and Relief Everywhere
Case W. Res J. Int'l L	Case Western Reserve Journal of International Law
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
CEDC	Children in especially difficult circumstances
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CERD Committee	Committee on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
Committee of Experts	Committee of Experts of the African Charter on the Rights and Welfare of the Child
CRA	Child's Rights Act
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities

CYPL	Children and Young Persons Law
DFID	Department for International Development
ECHR	European Court of Human Rights
ECOWAS	Economic Community for West African States
EFA	Education for All
ESSPIN	Education Sector Support Programme in Nigeria
ETF	Education Trust Fund
FCE	Federal Executive Council
FGM	Female Genital Mutilation
FME	Federal Ministry of Education
FTI	Fast Track Initiative
GA	General Assembly
GCE	Global Campaign for Education
GDP	Gross Domestic Product
GNI	Gross National Income
HIV	Human Immunodeficiency Virus
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural
ICJ	International Court of Justice
ICT	Information and Communications Technology
ILO	International Labour Organization
IMF	International Monetary Fund

IT	Information Technology
JICA	Japan International Cooperation Agency
JSS	Junior Secondary School
KIOS	The Finnish NGO Foundation for Human Rights
Loy L.A. Int'l & Comp L.J	Loyola of Los Angeles International & Comparative Law Journal
MOEST	Ministry of Education Science and Technology
MPs	Members of Parliament
NCLR	Nigerian Constitutional Law Reports
NGO	Non-governmental organisation
NWLR	Nigerian Weekly Law Reports
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OP	Optional Protocol
REC	Recommendation
RES	Resolution
RTE	Right to Education
RTI	Research Triangle Institute
SC	Supreme Court cases
SCRA	Supreme Court Reports Annotated
SERAP	Socio-Economic Rights and Accountability Project
TPR	Teacher-Pupil Ratios
UBE	Universal Basic Education
UBEC	Universal Basic Education Commission

UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Cultural and Scientific Organization
UNGAOR	UN General Assembly Official Records
UNGEI	UN Girls' Education Initiative
UNHCR	United Nations High Commissioner for Refugees
UNHDI	United Nations Human Development Index
UNICEF	United Nations Children's Fund
UPE	Universal Primary Education
USA	United States of America
USAID	US Agency of International Development
VAT	Value Added Tax
WDEFA	World Declaration on Education for All

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Chapter One

Introduction

‘In some parts of the world, students are going to school every day. It’s their normal life. But in other part of the world, we are starving for education... it’s like a precious gift. It’s like a diamond.’¹

1.1 Introductory Remark

Education is a basic human right that is necessary for enjoying many other rights.² It is transformative and empowering. Rene Maheu has rightly observed that;

Education is no longer the privilege of an elite or the concomitant of a particular age: to an increasing extent, it is reaching out to embrace the whole of society and the entire life-span of the individual. This means that it must be continuous and omnipresent. It must no longer be thought of as preparation for life, but as a dimension of life, distinguished by continual acquisition of knowledge and ceaseless re-examination of ideas.³

Education has much to contribute to both individual and national development and ought to be regarded by states as an investment in human capital.⁴ Additionally, from a human rights perspective, it has been acknowledged that the right to education is essential for people to be aware of the other rights they are entitled to, to exercise them, and to be empowered to demand them.⁵ States are the principal duty bearers and are under obligation to fulfil, respect and protect all human rights for all individuals within their jurisdiction. States have the primary responsibility to promote and ensure the right to education for all individuals in their territories and subject to their jurisdiction. States parties to relevant human right treaties on the right to education are required to establish an accessible educational system, and refrain from actions which may prevent or limit its

¹ Abouraya, K.L. *Malala Yousafzai: Warrior With Words*, (Great Neck N.Y.: StarWalk Kids Media, 2014) p.10.

² UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, para 1, available at <http://www.refworld.org/docid/4538838c22.html> [accessed 17 June 2014].

³ Maheu, Rene, (Director-General of UNESCO), ‘1970 International Education Year, Message’ (1970-1971) *Annual Review of United Nations Affairs* pp.179-182.

⁴ Van Bueren, G. *The International Law on the Right of the Child*, (Dordrecht: Martinus Nijhoff Publishers 1994) p.232

⁵ CESCR *General Comment No13*, note 2, at para 1.

accessibility.⁶ The global community recognises education as a human right due to its indispensability to the preservation and enhancement of the inherent dignity of the person.⁷ Article 26 of the Universal Declaration of Human Rights (UDHR)⁸ clearly provides that every child is entitled to receive free and compulsory primary education in all States. The Committee on Economic Social and Cultural Rights (CESCR) endorses the position taken by the United Nations Children's Fund (UNICEF) and stated that 'primary education is the most important component of basic education'.⁹ Apart from the UDHR, the right to education is reiterated in a number of international human rights treaties. It is covered comprehensively in UNESCO's Convention against Discrimination in Education¹⁰ and Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹ Several other human rights treaties recognise the right to education for specific groups of individuals. These include the Convention on the Rights of the Child (CRC),¹² (Articles 28&29), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹³ (Article 10); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families¹⁴ (Articles 12 and 30); the Convention on the Elimination of Racial Discrimination¹⁵ (Article 5(e)), and the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities¹⁶ (Article 24). Regional human rights treaties also include provisions on the right to education. For example, the African Charter on Human and Peoples' Rights (ACHPR or Banjul Charter) (1981) provides that every individual shall have the right to education¹⁷, and the African Charter on the Rights and Welfare of the Child (ACRWC) provides in Article 11 that every *child*

⁶ *Ibid*, paras 46 &47.

⁷ *Ibid*, para. 4.

⁸ Universal Declarations of Human Rights. G.A. Res 217, UNGAOR 3rd Sess.Supp. No 127 at 71 UN Doc A/80 (1948).

⁹ CESCR, *General Comment No. 13* note 2, at para 9.

¹⁰ Article 4(a), UNESCO Convention against Discrimination in Education (1960), UNTS 429, p. 93, (entered into force on 22nd May 1962).

¹¹ International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec 16 (1966) UNTS 993, p.3 (entered into force Jan 3, 1976).

¹² Convention on the Rights of the Child (CRC), adopted 20 November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN Doc A/RES/44/25 (1989), UNTS 1577.

¹³ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), UNTS 1249 p.13 (entered into force 03 September 1981).

¹⁴ International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990), G.A.RES/45/158. U.N. Doc. A/45/49 (1990).

¹⁵ International Convention on the Elimination of All Forms of Racial Discrimination (1965), UNTS 660, p. 195, (entered into force on 4 January 1969).

¹⁶ International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, A/RES/61/106 U.N. Doc. A/61/49 (2006), (entered into force on 3 May 2008).

¹⁷ Article 17(1), African Charter on Human and Peoples' Rights (ACHPR) (also known as "Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

should have the right to education.¹⁸ The objectives of education are also expounded in the various international human rights instruments with the UDHR stipulating that education should help to develop the human personality and strengthen respect for human rights.¹⁹ Article 13 of the ICESCR similarly elaborates as follows:

...education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. [...] that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups...

Likewise, Article 29 of the CRC provides that the education of the child shall be directed towards the ‘development of the child's personality, talents and mental and physical abilities to their fullest potential.’²¹ In sum, within human rights contexts, education is a prerequisite for the development of the child’s intellectual and spiritual potential and it prepares the child to become an integrated member of the society.

There has been a shift in the world’s perception of the right to education over the past few decades. This shift has been made from a focus on ensuring free primary education as an obligation on the State, to a focus on government responsibility as discretionary. This has been attributed to the distinctive influence of global education strategies such as the Jomtien Conference on Education for All (1990) and Dakar World Education Forum (2000).²² Tomasevski has made the following observations:

[...] excerpts from global targets for education promised by international conferences between 1990 and 2005 demonstrate that it took fifteen years to revert to the wording of the Universal Declaration of Human Rights that education should be free and compulsory. Those fifteen years, when global targets even rhetorically offered much less than what is

¹⁸ African Charter on the Rights and Welfare of the Child (ACRWC) (1990), OAU/Doc/CAB/LEG/24.9/49 (1990) entered into force Nov 29 1999.

¹⁹ Article 26(2) UDHR.

²⁰ Article 13(1) ICESCR.

²¹ See Committee on the Rights of the Child, *General Comment 1: The Aims of Education* (Article 29 (1) Convention on the Rights of the Child), U.N. Doc. CRC/GC/2001/1 (2001).

²² The documents generated at the Jomtien Declaration used terms such as “access to education”, or “meeting learning needs” instead of the right to education. See; *Final Report of the World Conference on Education for All Meeting Basic Learning Needs, Jomtien, Thailand 5-9 March 1990* UNESCO, World Declaration on Education for All and Framework for Action to meet Basic Learning Needs, held in Jomtien 5-9 March 1990. Available at <http://www.unesco.org/education/wef/en-conf/Jomtien%20Declaration%20eng.shtm> [accessed 17 June 2014].

mandated by international human rights law, reflect deep divisions within international community regarding the very design of education.²³

She pointed out that the Millennium Development Goals (MDGs), Education for All (EFA), Fast Track Initiative (FTI) School Fee Abolition Initiative (SFAI), all do not define governmental obligation to make primary education free and compulsory as a human right.²⁴ These shifts of emphasis are of particular concern in the thesis, because in some cases, as will be seen, they have been accompanied by the expression of less than total commitment to the principle originally proclaimed in article 26 of the UDHR, and in other cases by the pronouncement of new principles not specifically mentioned in the UDHR. For example, though the UDHR proclaims that everyone should have access to free and compulsory elementary education, the Framework for Action on the World Declaration on Education for All (Jomtien 1990), omits the concepts of 'free' and 'compulsory'²⁵, instead a more servile expression of 'primary education' is presented. Additionally, when it comes to the education of children, 'primary schooling' is considered as 'the main delivery system of basic education' in the UDHR. Whereas, the World Declaration on Education for All stresses the importance of meeting 'basic learning needs' which is considered as the ultimate goal.²⁶ The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.²⁷ This is a clear departure from international human rights law, which identifies human rights, including the right to education, as universal. On the other hand, basic education is more than an end in itself; it is the foundation for lifelong learning and human development on which countries may build, systematically, further levels and types of education and training.²⁸ In addition, the Declaration adopted by the World Conference on Education for All proclaims that, 'Every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs'.²⁹ Tomasevski pointed out that the twin notions of 'elementary' and 'fundamental education' in the UDHR have been overtaken

²³ Tomasevski, K, *The State of the Right to Education Worldwide Free or Fee: 2006 Global Report*, p. xix, available at http://www.katarinatomasevski.com/images/Global_Report.pdf/ [accessed 17 June 2014].

²⁴ *Ibid.*, at p xi.

²⁵ World Conference on Education for All: *The Dakar Framework for Action*, adopted by World Education Forum, Dakar, Senegal, 26-28 April 2000, available at <http://www.unesco.org/education/wef/en-conf/dakframeng.shtm> accessed 17 June 2014.

²⁶ Article 1 UNESCO, World Declaration on Education for All and Framework for Action to meet Basic Learning Needs, held in Jomtien 5-9 March 1990. Article 1, available at <http://www.unesco.org/education/wef/en-conf/Jomtien%20Declaration%20eng.shtm> accessed 17 June 2014.

²⁷ *Ibid.*, article 5.

²⁸ *Ibid.*

²⁹ *Dakar Framework for Action*, note 25.

by the notion of ‘basic education’, while at the same time there has been a shift of emphasis from ‘education’ to ‘learning’: from what society should supply, which is education that is ‘free’, ‘compulsory’ and focused towards what members of society are said to need.³⁰

Tomasevski has expressed that what should have been affirmed as each child’s birth right was converted into a long-term development goal for States to be gained by 2015.³¹ It is noticed that The World Declaration on Education for All does not mention ‘elementary’, ‘fundamental’, ‘free’ or ‘compulsory’ education and the United Nations Millennium Development Goal 2 (MDG2) (2000) also aims to ‘[e]nsure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling,’³² omitting reference to “free” or “compulsory”. The language used by the MDGs avoids the language of human rights and omits who should be responsible for violations of the right by non-achievement of Goals. Tomasevski further noted that the evasive language of the global political commitments reflects the underlying decision not to use the law as guidance.³³ She argued that global political commitments have demoted education from ‘right’ to ‘need’. With the need approach, the individual deserves assistance; whereas the rights approach stresses that the individual is entitled to assistance and is empowered to claim the right. The consequence of the need approach is that education thereby becomes a commodity which may be traded against a price and those unable to pay the price are excluded.³⁴ To sum it all up, in the words of Tomasevski, ‘[...] The right to education has been replaced by access to education, government’s obligations to ensure free education has been replaced by investment, conditioned by adequate rates of returns.’³⁵ Therefore, the conceptualisation of the right to free and compulsory primary education has shifted; this demonstrates why the right to free and compulsory primary education faces so many obstacles.

This thesis argues that primary education should be freed from all financial obstacles so that all children can go to school. This is mandated by international human rights law and

³⁰ Tomasevski, *2006 Global Report*, note 23 at xx.

³¹ *Ibid*

³² Millennium Development Goal 2 Target: Achieve Universal Primary Education available at <http://www.un.org/millenniumgoals/education.shtml> [accessed 17 June 2014].

³³ Tomasevski, note 23 p. xx.

³⁴ *Ibid*

³⁵ Tomasevski, *Education Denied: Costs and Remedies*, (London: Zed Books 2003), p.93.

was endorsed in the 2005 World Summit Outcome.³⁶ The study seeks to interrogate Nigeria's current free and compulsory primary education practices by describing its historical evolution and using the 4As framework³⁷ to assess the quality of education delivered. It analyses Nigeria's educational policies and domestic laws within the context of relevant international human rights treaties it has ratified to establish whether its current policies and laws on education are up to the international standards. Further, using Ghana and Kenya, two African countries that have more effective educational practices, as case studies to compare how similar problems have been solved in these countries. Finally, recommendations would be made for the effective advancement of the right to education in Nigeria.

1.2 State of Education in Nigeria

The number of children who are out- of school in Nigeria has increased from 8 million in 2007 to 10.5 million- the highest figure in the world.³⁸ Sixty-one percent of children age 6-11(64 percent of males and 58 percent of females) attend primary school.³⁹ Number of students enrolled in all primary schools keeps declining. In 2006, 22,861,884 pupils were enrolled in all the primary schools. In 2010, 20,663,805 were enrolled.⁴⁰ The most common factors for such a large number of out- of- school children in the country are; poverty (resulting in the inability of the parents to meet both the direct and indirect educational costs of their children), child labour as there are needs at home, and distance to school. The United Nations Development Report states that those who are less likely to attend are usually from "poorer households".⁴¹ This study is therefore of fundamental importance in contributing to the debate on how to guarantee a full implementation of the

³⁶ UN General Assembly, *2005 World Summit Outcome : resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, available at: <http://www.refworld.org/docid/44168a910.html> [accessed 17 June 2014]

³⁷ The right to education is considered to comprise of four interrelated and essential features commonly referred to as the "4-As" which stipulate that primary education must be: *available, accessible, acceptable, and adaptable*. These taken together provide the core human rights standards of education; they embody the intrinsic value of the right to education without which the right would lose its meaning. The 4A framework was developed by Katarina Tomasevski the former UN Special Rapporteur on the right to education. It is also expounded by CESCR in its *General Comment No. 13, The right to education*, para 6.

³⁸ UNESCO Institute for Statistics (UIS), available at: http://data.uis.unesco.org/?ReportId=184&IF_Language=eng [accessed 17 June 2014]. See also <http://www.soschildrensvillages.org.uk/news/archive/2012/07/too-many-children-out-of-school-in-nigeria-and-across-the-world>, [accessed 14 April 2015].

³⁹ National Population Commission (Nigeria) and Research Triangle Institute (RTI) International, *Nigeria Demographic and Health Survey (DHS) EdData Profile 1990, 2003, and 2008: Education Data for Decision Making*, (Washington DC: National Population Commission and RTI International 2011) pp. xx and 55.

⁴⁰ Federal Republic of Nigeria, *Fifth Periodic Report 2011-2014 on the implementation of the African Charter on Human and Peoples' Rights* available at www.statereport5.Nigeria.2013_eng1 [accessed 14 July 2014]

⁴¹ UNDP *The Millennium Development Goals Report 2007*: 2 available at: <http://www.un.org/millenniumgoals/pdf/mdg2007/> [accessed 17 June 2014]

right to full free compulsory primary education for all children in Nigeria. The abysmal state of primary education is one of several urgent developmental priorities that require the Nigerian Government's attention. While it is doubtful that any public school charges tuition fees in primary schools in Nigeria today, parents are however made to pay for different miscellaneous charges. Children whose parents are not able to make such payments or contributions are often barred from school, which essentially constitutes a denial of their right to free compulsory primary education. The Committee on Economic Social and Cultural Rights (CESCR)'s stance is clear on this, stating that:

[...]Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. [...] Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category.⁴²

In the meantime, school fees have been politically and theoretically abolished for primary schools and, the resultant effect has significantly increased primary school enrolment. Simultaneously, this has resulted in a decline in the quality of education being provided, resulting in high teacher-pupil ratios, inadequate infrastructures and teaching materials. The situation is exacerbated by insufficient budget allocation for education by the federal government. The issue of quality has been clouded by a preoccupation with meeting numerical targets and the political desire to proclaim high levels of achievement in school enrolment. It is essential for the State to uphold the principle of free compulsory primary education and also emphatically address quality challenges, rather than impede access to school for the children through indirect imposition of fees. Essentially, international human rights safeguards for free and compulsory primary education encompasses both its quantity and quality.

The fundamental legal impediment to the right to education in Nigeria is that the country's constitution does not currently recognise the right to education as an enforceable right. Rather, the constitution stipulates that the government would strive to provide free, compulsory and universal primary education "when practicable".⁴³ This is

⁴² CESCR *General Comment No 11 (1999) Plan of action for primary education (art. 14)*, E/C.12/1999/4. 10 May 1999, para 7.

⁴³ Section 18, 1999 Constitution of the Federal Republic of Nigeria.

an uncommitted undertaking which remains unmet to this day. Article 14 of ICESCR requires each State Party that has not been able to secure compulsory primary education, free of charge, to undertake, ‘within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years to be fixed in the plan, [...] of compulsory education free of charge for all.’⁴⁴ Meanwhile, Nigeria had adopted a National Plan of Action in line with the CRC Committee’s earlier recommendations⁴⁵ which “puts children first as a state policy” and which emphasises health, education, and protection of children. The Committee remarked that the State had not drawn up a cost plan with clear indicators, and was not allocating adequate financial and human resources for its running.⁴⁶

In the Nigerian Constitution, the various states in the country have the responsibility for administering primary education⁴⁷ and the central government is to only guarantee respect of fundamental rights and determine the minimum standards in education.⁴⁸ This thesis explores the weakness of the constitutional provisions in two main areas; firstly, how free and compulsory primary education is not a fundamental right due to the conditional ‘practicable’⁴⁹ phrase, and the absence of constitutional remedies in case of the non-fulfilment of this right by the State. Secondly, the listing of right to education under “Fundamental Objectives and Directive Principles of State Policy” which expressly provides that matters grouped under that section are not justiciable.⁵⁰ This study also points out the legal principle of indivisibility of children’s’ rights whereby there is no hierarchy of rights, and argues for constitutional reforms in that regard. The responsibility of individual states in the country to define and put in practice free primary education for all has led to considerable disparity between northern and southern states, with the northern states trailing behind the southern states particularly with regard to the education of girls.⁵¹ This is rooted in the country’s peculiar educational history and political

⁴⁴ CESCR *General Comment 11*: note 42 para 1.

⁴⁵ National Plan of Action on CRC/CRA 2009-2015 (CRC/C/15/Add.257, para. 18).

⁴⁶ Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding observations: Nigeria)*, CRC/C/NGA/CO/3-4, 21 June 2010, paras 12& 13.

⁴⁷ 2nd Schedule Part 1, para 60(e); Section 4(7) & part II 2nd Schedule para 30; Section 7(5) & 4th Schedule para 2, 1999 Constitution of the Federal Republic of Nigeria (as amended).

⁴⁸ 2nd Schedule, Part I, Item 60(e) 1999 Constitution of Nigeria.

⁴⁹ Section 18(3) Constitution of Nigeria.

⁵⁰ Section 6(6)(c) Constitution of Nigeria

⁵¹ In Northern part of Nigeria, 42 percent of children attend school compared with 83 percent in the Southern parts. Males are more likely than females to attend primary school (64 percent versus 58 percent). See National Population Commission (Nigeria) and RTI International, *Nigeria Demographic and Health Survey (DHS) EdData Profile 1990, 2003, and 2008: Education Data for Decision Making*, (2011 Washington DC: National Population Commission and RTI International) pp xx and 55.

structure.⁵² This is discussed fully in chapter four of this work. It is against this background that this study will explore the practical ways of entrenching education as a legally enforceable right nationwide. Although there is no constitutional guaranteed right to free and compulsory primary education as such, but whenever it is provided by the various states in the country, it must be delivered to all on an equal basis as required by the constitutional right to equality.⁵³ Also article 28(1) of the CRC places a duty on State Parties to recognise the right of the child to education with a view to achieving the right progressively ‘on the basis of equal opportunity’.

On the other hand, the main social obstacle frustrating most children’s exercise of the right to education in Nigeria is poverty. Poverty is one of the most frequently cited factors behind children’s lack of access to primary education in Nigeria. It is a strong recurrent issue discussed frequently throughout in the thesis. It is intertwined with a combination of factors, including the necessity to contribute to the family’s basic survival, the distance of rural schools, traditional opposition to the education of girls, the imposition of school fees, and the cost of books and school materials. The enrolment explosions triggered by announcements of free education at every implementation of Universal Primary Education (UPE) initiative have revealed how big a barrier the fees, charges and other financial contributions are for children from poor households, who are in the vast majority in Nigeria. But the resultant effect is that all previous estimates on education have routinely exceeded budgetary allocations because high numbers of children have shown up at school once an announcement was made that education would be free.⁵⁴ The insufficient budget allocation to the respective state authorities and general poverty are major obstacles to the realisation of the right to free and compulsory primary education in Nigeria. There is a confluence between poverty, cultural beliefs, and the nature of child domestic labour practices being impediment to schooling for children in Nigeria. There is presently also the issue of internal armed conflicts and civil strife which disrupts normal patterns of life, as children have to leave their home and family environment and move into temporary settlement, a result of which regular schooling for pupils is impossible.⁵⁵

⁵² Luggard in accordance with his promise of non-interference in the religion of the people in the North thwarted the attempts of Christian missionaries to open mission schools there. See also; Colonial Office Reports. 1905-1906 of N. Nigeria p.470

⁵³ Section 42, 1999 Constitution of Nigeria

⁵⁴ Taiwo, C.O., *The Nigerian Education System: Past, Present & Future*, (Lagos: Thomas Nelson (Nigeria), 1980) p.166.

⁵⁵ For example, as a result of the “Boko-Haram” insurgency, and the kidnapping of the 215 Chibok girls most schools in certain areas of Borno and Adamawa states (North Eastern part of Nigeria) have been shut.

The state has an obligation to protect the child from a third party that wants to prevent the child from receiving education.⁵⁶

1.3 Methodology

Both analytical and comparative research methodologies will be used in this study. In employing analytical methodology, information already available will be collected, discussed, explained, tested, verified, analysed and interpreted. Analytical methodology enables a critical evaluation of materials gathered in order to present the convincing result in a research. Using comparative methodology, comparison opens one's eyes to defects and weaknesses in one's national legal institution. The knowledge of the other legal system obtained as a result of the comparison study will lead to a greater understanding on the international level. The main function of comparison methodology is to facilitate legislative reforms and enable practical improvement of the law, as a result of comparative investigation of legal systems in other countries. This can bring about methods of legal reforms in the author's country.

In this study, the concept of children's right to free and compulsory primary education will be identified and analysed under relevant international human rights laws. To do this, the following human rights instruments namely; UDHR, ICESCR, CRC, ACHPR, and ACRWC, will all be examined, using relevant analytical techniques. This will be done by examining the contents of the instruments, explaining and interpreting the relevant provisions in these instruments, guided by the rules of interpreting treaty provision.⁵⁷ To give intended interpretation to terms the *travaux preparatoires* of the treaties will be examined so as to interpret the treaties in such a way that the intended protection offered could be realised. The Nigerian Constitution and the other domestic legislations especially Nigerian Child's Rights Act (CRA) 2003 and Compulsory Free Universal Basic Education Act (UBE Act) 2004 will be analysed to point out any inconsistency or legal loopholes between the domestic laws and the international human rights laws to reveal the areas of weaknesses in the domestic laws. Reports submitted by Nigeria to the various Treaty Bodies and concluding observations will also be examined to show the extent of compliance by the country. In addition, General Comments, which are useful in clarifying the contents of right to education as well as other issues related to the

⁵⁶ CESCR, *General Comment No 13*, note 2 para 47

⁵⁷ Articles 31&32 Vienna Convention on the Law of Treaties

protection of the right will be scrutinised. Secondary sources such as monographs and journal articles on the subject will also be consulted. Judicial decisions on right to education by relevant domestic courts and international tribunals will be also examined.

1.3.1 Comparative Case Studies

The comparative methodology will be used in analysing, comparatively, the national laws of Ghana and Kenya in relation to that of Nigeria. In this study, an approach to measure Nigeria's compliance is to compare its performance in implementing free and compulsory primary education programmes with other African countries with similar social, political and economic situations. As a result, Ghana and Kenya are selected for comparative purposes with Nigeria so as to gain experience from their approaches to the implementation of their free and compulsory primary education programmes. Examples of good practices as well as failures and shortcomings from those two countries would be identified and used to illustrate general tendencies and to inform decision makers in Nigeria. The educational histories of all the three countries have similar elements and themes in that they were all British colonies and have experienced varying degrees of instability with major regional conflicts in the past decades. Nevertheless, Ghana and Kenya presently constitutionally guarantee free and compulsory primary education for every child.⁵⁸ In addition, an explicit and detailed enforceable Bill of Rights including children's right to compulsory education is incorporated into the new Kenyan Constitution.⁵⁹ By contrast, the Nigerian Constitution is silent with regard to these important issues. The comparison is to show how formal human rights guarantees are translated into practice apart from detecting their existence in international and domestic legal sources. These case studies provide important insights into how universal primary education has been achieved in other African countries from both legal and financing perspectives and thereby providing practical examples for other African countries such as Nigeria attempting to achieve free and compulsory primary education for all. As pointed out by Coomans *et al*, comparisons focus on the similarities and differences among the selected countries, using concepts and constructs that have been analysed across the countries that have been selected for analysis.⁶⁰

⁵⁸ Article 25(1), 1992 Constitution of the Republic of Ghana & Article 53(1) (b), 2010 Constitution of the Republic of Kenya.

⁵⁹ Chapter IV, 2010 Constitution of the Republic of Kenya.

⁶⁰ Landman, Todd, 'Social Science Methods and Human Rights', in Coomans, Fons *et al*, (eds), *Methods of Human Rights Research*, (Oxford: Intersentia, 2009), p.33.

The thesis strongly argues that free and compulsory primary education should be each child's birth right which the child is entitled to claim. The Nigerian government also has the responsibility to eliminate all barriers which children may face accessing it.

1.4 Motivation for the Study

I decided to undertake this study due to my encounter with two young children in 2011. The first one was Lola, who was ten years old when I met her. I always used to buy fruits from her mother who sold them by the road side. One morning I noticed that Lola was at her mother's stall when she should have been in school. I asked her mother the reason why she had not allowed her daughter to go to school that morning. She told me that Lola was asked to make a payment at school for some school material and she could not afford it, so her daughter has been prevented from coming to school until the payment was made. I told her that the government says primary education is compulsory and she would be fined for preventing her child from being at school. Immediately she replied that since I am a lawyer, I should defend her as she was not able to send her child to school because it was unaffordable for her. This got me thinking that it is a fact that children from poor families would not be able to receive education if it was not completely free of all direct or indirect charges.

The other child I had an encounter with was six year old Peter; his father was a security guard in a residential building and all the family of six lived in the gate house. One morning I saw Peter coming back from school, and he was still in school uniform, so I asked him why he was not in school. He replied, 'they pursued me from school'. This meant that he was chased violently away from school because he could not pay for compulsory school material. Both Lola and Peter were denied access to education and they were prevented from going to court to enforce this right, due to legal barriers in the Nigerian constitution. I realised that while poverty denies children their right to education and thereby denies them dignity and limits their potential, the Nigerian constitution also denies them any avenue for a legal remedy.

The above encounters resolved my interest in researching the state of education in Nigeria. From my preliminary research, I discovered that poverty is prevalent in Nigeria, and more than 100 million Nigerians (64%) live on less than \$1.5 a day.⁶¹ More than half

⁶¹ DFID Nigeria, Operational Plan 2011-2015, Updated June 2012, p2.

of the 10.5m children out of school in Nigeria are in the north.⁶² Of the 10.5 million out-of-school children, the majority of them girls, 60 percent of girls who live in the north, do not attend school and are denied their right to education.⁶³ This is a right to which the Nigerian government committed itself under the CRC. Realising that in 21st century children in Nigeria still encounter formidable constraints in their efforts to enrol in and attend primary school, I recognised that there is an urgent need to analyse the constraints that keep large numbers of children out of school.

After a visit to Nigeria in February 2012 by some UK MPs from the All-Party Parliamentary Group on Global Education for All, in their report to the parliament this was their observation:

...The four schools we visited near Abuja and in Lagos were certainly characterised by enthusiastic young people but also by inadequate resources and old-style “chalk and talk” teaching delivered from the front of overcrowded classrooms rather than through engagement with young people. Despite that, the young people we met seemed captivated by the experience and willing to sit it out to progress and try to advance themselves.⁶⁴

It could be seen that notwithstanding the various barriers children in Nigeria are facing in having access to education, most are undeterred. I find a great motivation in these children’s resilience and in their ingenious optimism. This has fuelled my resolve to do a study on the right of children to free and compulsory primary education in Nigeria.

1.5 Statement of Problem

While the importance of education is emphasised worldwide and the need of primary education for children is being well documented by scholars, there are still a large number of children who do not attend primary school in Nigeria. A very large number of children in Nigeria still encounter impediments in their efforts to have access to schooling. Despite the emphatic reiteration of various children and human rights laws that no child should be deprived of basic education, several factors act in concert or separately to keep children

⁶² <http://www.bbc.co.uk/news/world-africa-11427409> [accessed 12 April 2015]

⁶³ Chris Kay, Bloombergview.com available on www.bloomberg.com/news/2014-06-15/Nigeria-has-highest-number-of-children-out-school-children [accessed 26 June 2014].

⁶⁴ Bob Blackman MP, *An adjournment debate held in the House of Commons to discuss how Nigeria is addressing its major educational challenges, particularly education for girls and community involvement in education* 20 March 2012. www.parliament.uk/Reports/AppG-Global-Education-for-All-Nigeria [accessed 26 March 2013].

out of school in Nigeria. These barriers can be grouped into legal, economic and socio-cultural barriers and, in addition, supply side barriers and costs of funding.

1.5.1 Legal Barriers

The Nigerian Constitution provides that the government shall *when practicable* provide free compulsory and universal basic education,⁶⁵ which is a far cry from the State's obligation under relevant international human rights instruments it has ratified. This 'practicable' clause changes the right to education declared in the constitution into merely an aspiration or declaratory statement. Whereas Nigeria has an obligation under article 14 of the ICESCR, which requires each State party which has not been able to secure compulsory primary education, free of charge, to undertake, within two years, to work out and adopt a detailed plan of action for the progressive implementation within a reasonable number of years. In spite of these obligations, Nigeria has neither drafted nor implemented a plan of action for free and compulsory primary education as is required.⁶⁶ The power of the courts in enforcing the right to education is also removed by the constitution.⁶⁷

Constitutional provisions concerning socio-economic and environmental rights, such as right to education, health and adequate standard of living are consigned to Chapter II of the constitution entitled "Fundamental Objectives and Directive Principles of State Policy";⁶⁸ which are non-justiciable.⁶⁹ Issues or questions as to whether any law is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II cannot be challenged in court.⁷⁰ The result is that there is the absence of an effective enforcement procedure for these rights, which constitutes a serious legal barrier against the enjoyment of the right to education in Nigeria. Furthermore, the Nigerian Constitution which is the 'grund norm' does not expressly provide for a right to education in its substantive sections. In essence, there is a lack of consistency on the right to education between the Nigerian constitution and the international human rights laws to which the country is bound through its ratification. This is discussed fully in chapter five of this thesis. Generally, under international human rights law, socio-economic rights in

⁶⁵ Section 18(3), 1999 Constitution of the Federal Republic of Nigeria.

⁶⁶ Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding observations: Nigeria)*, note 45.

⁶⁷ Section 6 (6) (c), 1999 Constitution of the Federal Republic of Nigeria.

⁶⁸ Section 18, 1999 Constitution of the Federal Republic of Nigeria.

⁶⁹ Section 6(6), 1999 Constitution of the Federal Republic of Nigeria.

⁷⁰ *Ibid.*

regard to basic needs such as education, health and shelter continue to be perceived as discretionary and distinct administrative initiatives that fall into the realm of social policy rather than enforceable law. This confirms that in practice socio-economic rights are still marginalised and still considered, inaccurately, as programmatic, aspirational, and not justiciable.⁷¹

With regard to the legal barriers, this thesis will examine examples of other countries to show the impact of constitutional provisions on children's rights, especially the right to education, where remedies are incorporated as part of an enforceable bill of rights. It will also analyse the jurisprudence of relevant international and regional institutions such as the recent landmark case of *SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission*⁷² decided by the ECOWAS Community Court of Justice. Nigeria had argued in that case that education is a *mere* directive policy of the government and *not* a legal entitlement of the citizen. It further submitted that the right to education is non-justiciable according to the Nigerian Constitution. Also, in the concluding observation to Nigeria's report to the CRC Committee in 2010,⁷³ the Committee urged Nigeria, 'to ensure that the right to free and compulsory education is incorporated in the Constitution [...]'.⁷⁴ Currently, the provision of primary education is on the Residual Legislative List, and its implementation resides with the state and local governments, while the federal government only provides policy directions and plays a supporting role.⁷⁵ The resultant effect is that there is lack of uniformity in the implementation of primary education as the various states operate the implementation of primary education differently and thus some states are more progressed in their delivery of education while some states lag behind. Although these differences would not disappear immediately if the Constitution is amended to reflect international human rights standards more closely, nonetheless, the current disparate systems in the country reduce the effect of state's ratification significantly.

1.5.2 Socio-cultural Barriers

Arguments based on local custom, culture and religion are also often used to prevent many children from receiving primary education in different parts of the country, which

⁷¹ Ssenyonjo, Manisuli, 'Reflections on state obligations with respect to economic, social and cultural rights in international human rights law', (2011) Vol. 15, No. 6, *The International Journal of Human Rights*, 969–1012 at 970.

⁷² *SERAP v. Nigeria*, Judgement, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, Nov. 30, 2010).

⁷³ Committee on the Rights of the Child, *Consideration of Reports (Concluding observations: Nigeria)*, note 45.

⁷⁴ *Ibid*, para 72(b).

⁷⁵ 4th Schedule para 2, 1999 Constitution of Nigeria.

has led to several children, particularly from the Northern parts of the country, being prevented from receiving primary education.⁷⁶ The State has an obligation under human rights law to protect children from third parties who might prevent them from receiving education.⁷⁷ As reflected in the motivation for this research in section 1.4 above, poverty is very prevalent in Nigeria, particularly in the rural areas, therefore school fees or hidden costs of schooling and lack of food and educational materials and child labour hinder school attendance and contribute to high drop-out rates. Another cultural norm which exists in many cultures is that educating girls is seen as less valuable, or not expected, and these girls may instead work, providing domestic services. Discrimination in girls' access to education persists in many part of the country, owing to customary attitudes, early marriages and pregnancies, and lack of adequate and physically and otherwise accessible toilets for girls. Equality of access to and attainment of educational qualifications is necessary if more women are to become agents of change in the country. Literacy of women is an important key to improving health, nutrition and education in the family and to empowering women to participate in decision-making in society.⁷⁸ Investing in formal education and training for girls, with its exceptionally high social and economic return, has attested to be one of the best means of achieving viable development and economic growth that is both sustained and sustainable.⁷⁹

Parents in some areas have a cultural norm whereby labour is seen as more valuable and productive than education. In addition, dire socio-economic conditions left families with little choice but to allow and compel their children to enter into employment. Parents feel justified in expecting their children to sustain or augment their income as opposed to enrolling in school. In Nigeria, poverty has forced many children into work, but the truth is that being illiterate will further propel the poverty cycle. The impact of HIV/ AIDS causes a sudden loss of family income in Nigeria. The phenomenon of child-headed households is also associated with the HIV/ AIDS; such orphaned children would need to work to care of other members of the family. For such children any cost on schooling is beyond their reach, this prevents the affected children from receiving education.

⁷⁶ Fafunwa A.B., 'Islamic concept of education with particular reference to modern Nigeria' (1970) Vol.1 No.1: *Nigerian Journal of Islam*, p18.

⁷⁷ CESCR, *General Comment No. 13*, note 2, para 47.

⁷⁸ Mahmud, S & Amin, S 'Girls' schooling and marriage in rural Bangladesh', (2007) 5(4) ICCD,R Periodicals, p.4.

⁷⁹ Beijing Platform for Action adopted September 1995. Chapter IV. B. Education and training of women para 69

1.5.3 Supply Side Obstacles

In Nigeria it is obvious that the school environment is mostly learner unfriendly. School buildings are often dilapidated and there is a shortage of teachers at all levels of basic education in schools.⁸⁰ The safety and security of the children is lacking as schools are unfenced. There is frequent repetitive and prolonged teachers' strike actions coupled with low teacher's commitment due to poor pay.⁸¹ Teaching is done in learner unfriendly school environments.⁸² In most schools, sanitation is generally poor with insufficient numbers of toilets and drinkable water points are practically absent in schools.⁸³ Many schools lack an adequate number of classrooms and overcrowding is a major problem.⁸⁴ Furniture for the students is inadequate with the result that pupils have to bring their own chairs and desks to school or sit on the bare floor.⁸⁵ These above listed problems stem from the inadequate budget allocation for primary education.

Another hindrance to providing free primary education in Nigeria is the cost. Coupled with the country's population of over 160 million and the decline in revenue from oil, the cost of providing free education has exacerbated the country's annual budget significantly.⁸⁶ The most frequently cited reason for children's lack of schooling is the inability of government to afford the costs due to the country's debt repayment of loans to global creditors such as IMF and World Bank. These global creditors attach stringent conditionalities that are not favourable to implementing free education, because debt repayment exceeds investments in development. As a result, government turns a blind eye when schools charge fees in primary schools when it is supposed to be free. There are often hidden costs such as buying uniforms, textbooks, and stationery, which many families simply cannot afford. Furthermore, when the quality of education is poor, parents do not see the value in sending their child to school, and therefore going to work is preferred. In sum, the country faces many challenges in implementing free and

⁸⁰ UNICEF, *Global Initiative on Out-of-School Children: Nigeria Country Study* March 2012, pp. xiii & xiv, available at: <http://www.uis.unesco.org/Library/Documents/out-of-school-children-nigeria-country-study-2012-en.pdf> accessed 3rd July 2014.

⁸¹ Njoku, Z.C. 'Primary school teachers' perception of the factors affecting children's access to basic education in Eastern States of Nigeria', (2001) 2 (1) *Journal of Primary Education*, pp.109-124.

⁸² UNICEF, *Global Initiative on Out-of-School-Children: Nigeria Country Study*, note 80, p. xv

⁸³ *Ibid*

⁸⁴ Bob Blackman MP's report about the schools they visited near Abuja and in Lagos, during an adjournment debate held in the House of Commons on 20th March 2012. Available at: <http://www.bobblackmanmp.com/news/398-nigerian-adjournment-debate-398> [accessed 6 March 2013].

⁸⁵ Akpofure, R., *The state of education in Nigeria*. (Abuja: UNESCO 1998), p. 3.

⁸⁶ Nwabueze, B.O., *Crisis and Problems in Nigeria's Education*, (Ibadan: Spectrum Books 1995) p.160.

compulsory primary education including inadequate financial resources, pernicious level of poverty and insurgence. These are expounded in chapters four and five in the thesis.

The thesis will critically analyse all these relevant barriers and seek to look particularly into the government's financing of primary education to determine whether primary education in Nigeria is underfunded. Relatedly, the extent of the support of international donors supporting the educational sector will also be examined. The Committee on ICESCR having called upon relevant international agencies to assist state parties to the greatest extent possible to meet their obligations on an urgent basis.⁸⁷

1.6 Research Questions of the Thesis

Based on the problems stated above, the overriding research question the thesis seeks to answer is as follows:

Has Nigeria demonstrated adequate commitment in its duty to guarantee free and compulsory primary education for children in Nigeria?

To guide the conceptual structure and organisation for the study are six sub-questions

- i. What were the strategies employed by Nigeria to promote and implement free and compulsory primary education pre-ratification of the relevant international human rights instruments?
- ii. How adequately do present Nigerian national laws and policies protect the right to free compulsory primary education?
- iii. Is the free and compulsory education programme in Nigeria adequately funded by the state and is free and compulsory primary education in Nigeria sustainable?
- iv. What are the main problems and obstacles confronting the realisation of free and compulsory primary education in Nigeria?
- v. Is the free and compulsory primary education programme in Nigeria in compliance with the requirements under the international human rights instruments?

⁸⁷ CESCR *General Comment No11: Plans of Action for Primary Education*, note 42, para 9.

- vi. What lessons can Nigeria learn from the comparative case studies of implementation of free primary education initiatives in Ghana and Kenya?

1.7 Literature Review

Although numerous researches have been carried out on children's right to education, most works on education of children in Nigeria have been carried out by educators and sociologists, and only a few have been done from a legal perspective. This research therefore aims to contribute further to the literature on children's right to education within the domestic and international legal framework. It is aimed at examining the problem in a different way, bringing a new revelation from some other perspective. The literature review is organised into three main themes, namely; (i) literature on children's rights generally ;(ii) literature on culture and universality of children's rights in traditional African context; and (iii) literature on children's right to education specifically. The purpose of this grouping is to examine existing bodies of literature on the key subject areas which the thesis covers. To this end children's right to education can be better understood and respected.

1.7.1 Literature on Children's Rights Generally

Ward has pointed out that the idea of children having rights is, in many ways, a revolutionary one.⁸⁸ He noted that historically, children have been under the control of their parents, and to a lesser degree, the state. And because children are presumed by law to lack the capacity of adults, they are denied full participation in the political, legal and social processes,⁸⁹ including on matters that affect them directly. Thus the implementation and safe guarding of children's rights is challenging. Likewise, Van Bueren describes child rights as a 'quiet revolution'.⁹⁰ Nonetheless, the persistent view of children as naïve and inexperienced has led to demands that children be protected. Freeman, in his article *Taking Children's Rights More Seriously*, argued that children are particularly vulnerable and need rights to protect their integrity and dignity.⁹¹ He elaborated further that because children have lacked association with rights it has been easy to brush their interests aside

⁸⁸ Wald M., 'Children's Rights: A Framework for Analysis', (1979), 12 *U.C.Davis Law Review*, 255 at 256.

⁸⁹ *Ibid.*

⁹⁰ Van Bueren, G., 'The Quiet Revolution: Children's Rights in International Law', in: Mary John (ed) *Children in Charge: The Child's Right to a Fair Hearing*, (London & Bristol: Jessica Kingsley Publishers 1996) p 27.

⁹¹ Freeman, M. 'Taking Children's Rights More seriously', (1992) 6 *International Journal of Law and Family*, 52 at 53.

in the sweep of 'consequential thinking'.⁹² Fortin stated that 'many of those who work with the legal principles affecting children are committed to the notion that children have rights'.⁹³ She encouraged all those concerned with children to consider them as important rights holders under the CRC, ECHR and ACRWC.⁹⁴ Hilary Rodham Clinton observed that children's rights seemed 'a slogan in search of definition'⁹⁵ and recommended careful study of both the psychological and legal issues implicated by the idea of rights for children.⁹⁶ Mac Donald, in his reference work, brings together the international, regional and domestic law relevant to the implementation of children's rights in the domestic jurisdiction,⁹⁷ although the work focuses on the UK domestic jurisdiction, nevertheless it is a vital reference material as it treats in detail the rights of the child in theory and in practice.

Not everyone shares the views of children's rights advocates. A considerable wealth of scholarship has discussed the topic of whether rights are suitable for children. Miller, a proponent of children's rights, in her work, *For Your Own Good: Hidden Cruelty in Child-Rearing and the Roots of Violence*, states as follows; 'Our history of exploiting children suggests that stressing responsibility over rights is unjustifiable. We fear rights will strip children of the protections of childhood. Perhaps we fear above all the loss of our own unquestionable authority.'⁹⁸ Mc Gillivray argued that to exempt children from human rights is to designate them as less than human. Children's rights are both 'fact and universal symbol'.⁹⁹ Mc Gillivray further noted, rightly, that foreclosing rights for children is foreclosing remedy.¹⁰⁰ Conversely, King, opposing the notion of children having rights, is of the opinion that, if children can be relied upon to know 'intuitively' what is best for them, and then there is no need for children's rights to be anything other than the expression of the needs and desires that can be found within children themselves.¹⁰¹ Also, Purdy, in her controversial article, *Why Children Shouldn't Have Equal Rights*¹⁰² argued

⁹² *Ibid* p54.

⁹³ Fortin, J. *Children's Rights and the Developing Law*, 3rd ed, (London: Butterworths 2009) p. 29.

⁹⁴ *Ibid*

⁹⁵ Rodham, H., 'Children under the law', (1973) 43 *Harvard Educational Review*, p. 487.

⁹⁶ *Ibid*.

⁹⁷ Mac Donald, A., *The Rights of the Child: The Law and Practice*, (Bristol: Jordan Publishing Ltd 2011).

⁹⁸ Miller, A., 'For your own good: Hidden cruelty in child-rearing and the roots of violence', (1994) 2 *The International Journal of Children's Rights*, 259.

⁹⁹ McGillivray, A., 'Why children do have equal rights' in reply to Laura Purdy, (1994) 2 *The International Journal of Children's Rights* 243-258 at 244

¹⁰⁰ *Ibid*

¹⁰¹ King, M., 'Against Children's Rights', (1996) 28 *Acta Juridica*, 28-50 at 36

¹⁰² Purdy, L. 'Why Children Shouldn't Have Equal Rights', (1994), 2 *The International Journal of Children's Rights* 223-241, at 225.

that parents love their children not only because they want them to be happy, but mainly because their moral temperament has enormous consequences for the future of society as a whole. She argued that a great deal of children's suffering arises because of poverty or ignorance.¹⁰³ In response, Mc Gillivray pointed out that, Purdy's argument plays powerfully on sentiment. 'That children should be cared for, protected and embedded in intimate relationships which guarantee their preservation and social maturation is deeply-held social norms. But sentimentalising childhood, constructing from these norms images of sweetness, purity and parental benevolence, cloaks a multitude of wrongs'.¹⁰⁴ Freeman, along the same vein, argues that benevolence is not enough: rights are 'valuable commodities' which permit challenge to standards of care, particularly important for children. To relegate children to goodwill rather than recognise rights fabricates childhood and concoct adult-child relations.¹⁰⁵ Others, such as Steinfels¹⁰⁶ and Hafen¹⁰⁷ expressed fear that expansion of the notion of children's rights will undermine the family structure to the detriment of children and society as a whole.

It is hereby submitted that certainly children's rights are a necessity and that regardless of the number of well cared-for children, there is a significant number of children who are abused, neglected, deprived of necessities or deprived of their dignity who need protection. Today it is fully recognised that every child has rights under international and national laws, and should not be deprived of these rights. It is necessary to concur with Freeman's assertion that;

...children's rights provide a comprehensive and consistent normative framework within which all children can grow through childhood as subjects entitled to the benefit of universally accepted legal norms to the point of being able to take full responsibility as free, rational agents for their own system of end.¹⁰⁸

Appreciating the general notion that children have rights is a necessary foundation for promoting their specific right to free and compulsory primary education, as will be argued in this thesis.

¹⁰³ *Ibid*

¹⁰⁴ Mc Gillivray, note 99 at 243.

¹⁰⁵ Freeman, M., note 91 p. 52.

¹⁰⁶ Steinfels, O'Brien, 'Children's Rights, Parental Rights, Family Privacy and Family Autonomy' in Gaylin, W. And Maclin, R. (eds) *Who Speaks for the Child*, (New York: Plenum Press 1982) 240. He argues that a loving family relationship can be damaged by assertions which not only promote individualism but also inhibit and undermine parental authority and family autonomy.

¹⁰⁷ Hafen, B., 'Children's Liberation and the New Equalitarianism: Some Reservations about Abandoning Youth to their Rights. (1976) 3 *B.Y.U.Law.Rev* 605.

¹⁰⁸ Freeman, M., note 91, p.57.

1.7.2 Literature on Culture and Universalism of Children's Rights in the Traditional African Context and Under Islamic Laws

In his work, Asante argues that 'the African conception of human rights was an essential aspect of humanism'¹⁰⁹ which will essentially include some notion of children's rights. Legesse is of the view that different societies formulate their conception of human rights in diverse cultural idioms and the ways in which they are valued are quite different.¹¹⁰ In African societies, rights were assigned on the basis of communal membership, family status or achievement. Donnelly identifies rights as a Western invention; he argues that most non-Western cultural and political traditions lack not only practice of human rights but the very concept of human rights as an artefact of modern western civilisation.¹¹¹

On the contrary, in their writing, Armstrong and her collaborators in their research, believe that the social and economic organisation of traditional Africa was such that individual 'rights' were often submerged into the kinship group or family.¹¹² Thus because of the emphasis on group solidarity, the concept of individual rights (as understood in the West) remained undeveloped and was in many cases dampened by the need to maintain unity and solidarity within the community. The individual's rights were conceived as dependent upon the collective interests of the group.¹¹³ Cohen dismisses the different cultural value systems having current importance; the author argues that what is important is that on ratification, a State obliges to recognise these rights whether or not they are regarded as rights under the respective culture.¹¹⁴ Freeman, knowing the importance of communities in the African setting, cautioned as follows;

...if we want to see our vision of children's rights prevail across communities [...] we must engage in dialogue. [...] Human/children's rights discourse must not be seen as a foreign imposition, as a tool of power rather than an element of shared common sense. It

¹⁰⁹ Asante, S.K.B. 'Nation building and human rights in emergent Africa' (1969) 2 *Cornell International Law Journal*, 72-107 at 74.

¹¹⁰ Legesse, A. 'Human rights in African political culture', in: K.W. Thompson, ed., *The Moral Imperatives of Human Rights: A World Survey* (Washington DC: University Press of America, 1980) 123-138 at 124.

¹¹¹ Donnelly, J. 'Human Rights and human dignity: An analytic critique of Non-Western Conceptions of Human Rights', in: Phillip Alston (ed), *The International Library Essays in Law and Legal Theory, Human Rights Law Vol 27*, (Aldershot Dartmouth Publishing Company 1996), 147-159 at 148.

¹¹² Armstrong, Alice et al, 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and South African Perspective', (1995) 3 *Int'l J. Child. Rts.* 333-368, at 336.

¹¹³ *Ibid.*

¹¹⁴ Cohen, Howard, *Equal Rights for Children*, (New Jersey: Littlefields, Adam & Co 1980) p.28.

is necessary to participate in dialogue that seriously engages local perspectives. We cannot adopt position of authority.¹¹⁵

Lopatka in his writing, *The Rights of Children are Universal*¹¹⁶ expounds that a child should be able to enjoy all the human rights laid down or proclaimed in the constitution of the individual countries and particularly in international conventions or declarations. But the rights of the child are only those rights that are granted to the child because, ‘the child, by reason of his or her physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth and that this applies to all children.’ He pointed out further that the physical and mental nature of the child is identical everywhere: “... each child has his or her human dignity and the same needs: for the protection of his or her personality.”¹¹⁷ Due account must also be taken generally of the importance of the traditions and cultural values of each specific people for the protection and harmonious development of the child.¹¹⁸ Baderin argues that the concept that children possess right has an older tradition in Islamic law than in international law.¹¹⁹

It is argued here that the recognition of the importance of traditions and cultural values of each people for the protection and harmonious development of the child does not mean that implementation of the rights granted to the child by the international laws should be abandoned. Rather if such cultures are inconsistent with the substance of those rights, such culture should be redundant. This is very relevant in relation to the promotion of children’s rights in African countries such as Nigeria, where it is important not to undermine the rights on grounds of cultural, customary and religious norms that deny children from enjoying important rights such as the right to education.

1.7.3 Literature on Right to Free and Compulsory Primary Education

Several rationales can be invoked to support the argument that the right to education is deserving of recognition and protection as a fundamental and constitutional right. It has been acknowledged, by the United States Supreme Court in *Brown v. Board of*

¹¹⁵ Freeman, M., note 91 p.57

¹¹⁶ Lopatka, Adam, ‘The Rights of Children are Universal’ In: M. Freeman and P. Veerman (eds), *The Ideologies of Children’s Rights*, (the Netherlands: Kluwer Academic Publishers, 1992) p.48.

¹¹⁷ *Ibid*, p 49

¹¹⁸ *Ibid* p.48

¹¹⁹ Baderin, M., *International Human Rights and Islamic Law*, (Oxford: Oxford University Press 2003) p.56.

*Education*¹²⁰ that ‘public education is the primary means through which a community preserves its culture and values, and transmits them to the younger generation’. Van Bueren has argued that education has much to contribute to both individual and national development and ought to be regarded by states as an investment in human capital.¹²¹ According to the World Bank, ‘without education development will not occur’.¹²² Based on its importance, various international human rights instruments have therefore recognised the right to education.¹²³ This was buttressed by Coomans’ statement that, in comparison to other rights laid down in the ICESCR and the CRC; the provisions on the right to education are comprehensive and concrete, guiding States in realising the right to education.¹²⁴ Hart *et al*, in their article, traced historical themes of the children’s rights as related to education. In the article, the meaning and significance of the right to education in the CRC was analysed in detail.¹²⁵ Alston and Bhuta attempt to address the reasons for treating education as a right, and paid considerable attention to the distinctive role played by the courts in India in the struggle to recognise and give effect to the right to education in the country’s constitution.¹²⁶ Bittensky writing in 1994 on the ‘education crisis’ of the United States of America recommends a national effort to be spearheaded by the federal government in collaboration with the states and private sector to overcome the ‘education crisis’.¹²⁷ Although she was writing on America in 1994, it is submitted that her canvassing for a national collaboration is salient to use on Nigeria’s own current ‘education crises. Beiter, in his work dealt extensively with the development of the right to education and went on to analyse the provisions of the right to education under the ICESCR.¹²⁸ Vandenhoe and others examined the relevance of the human right to education for undocumented children in Belgium and they affirmed that the right to education applies to all children regardless of legal status.¹²⁹ Johnson commented that the

¹²⁰ *Brown v. Board of Education*, 347 US 483, 74S.Ct 686, 98 L.Ed.873 (1954)

¹²¹ Van Bueren, G., *The International Law on the Rights of the Child*, note 4 p.232.

¹²² World Bank, *Education in Sub-Saharan Africa*, (Washington DC: World Bank 1988).

¹²³ Provisions on education in international and regional human rights instruments are; Article 26 of the UDHR (1948), Article 1 of the UNESCO Convention against Discrimination in Education (1960), Articles 13 & 14 of the ICESCR (1966), Articles 28 & 29 of the CRC (1989) and Article 11 of the ACRWC (1990).

¹²⁴ Coomans, Fons, Identifying Violations of the Right to Education, http://www.right-to-education.org/sites/right-to-education.org/files/resource/attachments/Coomans_Identifying_Violations_Right_to_Education_2007.pdf

¹²⁵ Hart et al, ‘Children’s rights in education: An historical perspective’, (1991), 20 (3), *School of Psychology Review*, 345-358.

¹²⁶ Alston, P., Bhuta, N., ‘Human Rights and Public Goods: Education as a Fundamental Right in India’, in Phillip Alston and Mary Robinson (eds), *Human Rights and Development Toward Mutual Reinforcement*, (Oxford: Oxford University Press 2005) chapter 11.

¹²⁷ Bittensky, S., ‘Every Child’s Right to Receive Excellent Education’, (1994), 2, *International Journal of Children’s Rights*, 137- 147 at 139.

¹²⁸ Beiter, K.D *The Protection of the Right to Education by International Law*, (Leiden: Martinus Nijhoff, 2005)

¹²⁹ Vandenhoe et al ‘Undocumented Children and their Right to Education’, (2011) 21 *International Journal of Children’s Rights* 631-639.

universal commitment to the child's right to an education is insufficient for very large numbers of children who continue to be denied that fundamental right, he states further that right to education places an obligation on states, donor states and multilateral agencies within the UN system.¹³⁰ Verhyede argues that, at the level of primary education, the State Parties are not only obliged to make primary education free, they also should make it compulsory.¹³¹

Given the above reasoning, children's right to education should be regarded as a mandatory right or a compulsory right. As such, it implies that children cannot be restrained from claiming their right to receive free primary education. Thus, children's right to education can legitimately be rephrased as "children's mandatory right to education". Therefore if quality primary education is provided free, without any hidden charges, then it is compulsory that every child of primary school age must attend school. Erring children should be rehabilitated, motivated and encouraged while their parents or guardians should be penalised where necessary. Van Bueren reiterates that the concept of free education and compulsory education are interrelated in international law, because by placing a duty on State Parties to provide free primary education, attendance can be made compulsory in law.¹³² In the best interest of the child, education should not be refused below a certain level.¹³³ Tomasevski has advocated the responsibility of the state to actively provide primary education that, if left to the free market, would be at a price, thus education would further exclude the poor.¹³⁴

Three authors have made invaluable contributions to the field of education in Nigerian. Fafunwa focused on education and free primary education in Nigeria and wrote a comprehensive history of Nigerian education and the development of the Nigerian education system. He described the three types of education recognised in Nigeria, namely; traditional, Islamic and formal educations although the main focus was on formal education.¹³⁵ Nwangwu also wrote extensively on the various UPE initiative programmes embarked upon by the Nigerian government and highlighted the problems responsible for

¹³⁰ Johnson, R., 'The Child's Rights to an Education: Consensus – minus one?' (2010) 18: *International Journal of Children's Rights*, 188-216.

¹³¹ Verhyede, M., *A Commentary on the United Nations on the Right of the Child, Article 28: The Right to Education* (Leiden: Martinus Nijhoff Publishers 2006) p.23.

¹³² Van Bueren, *The International Law on the Rights of the Child*, note 4, pp237-238.

¹³³ Verhyede, M., note 131 at p.23.

¹³⁴ <http://www.katarinatomasevski.com/> accessed 13th March 2013.

¹³⁵ Fafunwa, A.B. *History of Education in Nigeria* (London: George Allen & Unwin Ltd 1974).

their unsustainability.¹³⁶ He identified that inadequate government funding has always been a major problem in the implementation of free primary education in Nigeria. Hinchliffe in his report on public expenditures on education in Nigeria revealed that primary education is currently underfunded in the country.¹³⁷ While all these scholars have made genuine contributions to their respective fields, there is currently a lack of critical studies on educational delivery from a legal and human rights perspective on Nigeria.

1.7.4 Significance of the Study

This research is significantly aimed at filling that vacuum through its unique examination of free primary education in Nigeria from a rights based approach which focuses on the inalienable human rights of each individual, as expressed in international and regional instruments. The study contributes to the developing jurisprudence on the right of the child to free and compulsory primary education in Nigeria. This study is of critical importance because it is timely as the country is embarking on amendments of the present constitution; therefore this will be a contribution on the need to make primary education a fundamental right in the constitution so that it will be justiciable. Finally, there has not, to the author's knowledge, been any legal research of this nature dealing with the implementation and realisation of the right to free and compulsory primary education for children in Nigeria using international and African source documents, in a holistic manner. It is my humble belief that the outcome of this research will form one of the guidelines that will be used for further progress towards full realisation of the right of children to free and compulsory education in Nigeria.

1.8 Structure of the Thesis

The thesis is divided into seven chapters. Chapter one is the introductory chapter which provides a background about the basic theoretical framework and the legal concepts which the research relies on. The chapter gives an introduction on the state of education in Nigeria by identifying the existing situation regarding access of children to free and compulsory primary education. It discusses the plight of children in having access to primary education which is an uphill task as a result of various impediments such as;

¹³⁶ Nwangwu, N.A. *UPE: Issues, Prospects and Problems* (Benin: Ethiope Publishing 1995) p 197.

¹³⁷ Hinchliffe, Keith, *Public Expenditures on Education in Nigeria: Issues, Estimates and Some Implications*, Africa Region Human Development Working Paper Series August 2002 Human Development Sector Africa Region, (Washington D.C.: The World Bank 2002),p23.

constitutional provisions, prevention from seeking legal remedies in court for non-implementation of the right by the State; funding and financing of education, and religious and cultural hindrances. The chapter states the aims and objective of the study, the rationale of the study, and the research questions. Finally, the chapter examines some relevant literature on the subject.

Chapter two defines the beneficiary of the right and the type of education investigated. It defines the main terms relating to 'child' and 'education' as defined according to various international human rights instruments such as UDHR, ICESCR and CRC. This chapter is the building block essential to understand the content of the argument by analysing international standards and documents as well as interpretations of these documents. The chapter points out the limitations of conceptualising children's rights in light of adults' rights. Chapter two continues with the arguments of critics of children having rights and the counter argument of child rights proponents. The chapter extends the discussion of the child's rights by examining the concepts of universality and cultural relativity and considers the position of children in Africa. It outlines the universality and relativity dichotomy, highlighting both the validity and flawed nature of each side of the debate and makes a case for building a bridge between these two positions in order to achieve progress in protecting the right of children in Africa. It is argued that children's rights were thus not alien to Africa nor were they imposed by the western society. Instead they have always had a strong local resonance. Harmonisation of domestic law with international principles is suggested. After discussion of the notion of a 'right' in chapter two, the chapter further analyses the right to education as expressed in the various international instruments and covenants. The chapter extends the discussion of rights to education by examining the right to education as part of international customary law arguing that the relevant instruments regularly speak of "elementary/ primary/ basic education" which is to be "free/ without charge" and "compulsory", and also many countries constitutions and laws now protecting the right to free and compulsory primary education. On the basis of these considerations, it can quite correctly be claimed that the denial of a free primary education to children is a violation of this customary right under international law.

In chapter three, the main purpose is to argue the prominence of the right to education in the international law on human rights. It employs rights based approach (RBA) to interrogate state obligation in the fulfilment of the right to free primary education. sThe

chapter points out that the State's obligation under various international treaties can be summarised according to the following four-fold schema: to make education available, accessible, acceptable and adaptable. Education should exhibit these essential features. It is argued in the chapter that the right to free primary education is thus not only about access but also about content, and the obligation to provide primary education free of charge is inextricably linked with the obligation to ensure quality education. This chapter is concerned with the core content and obligations of free and compulsory primary education. It is advised that the minimum core content should be guaranteed to all citizens regardless of the existence of an economic downturn or crisis in a country. The chapter argues that the Declarations adopted at the international conferences has shifted emphasis from 'basic education' as a human right as stipulated by the international human rights instruments to 'basic learning needs' to avoid human right language and responsibility. A further emphasis of this stance is that right to education entails corresponding obligations as well as remedies for violations. Therefore the consequences of defining education as a human right are corollary duties and responsibilities. In essence, an element of chapter three is exploration of the implication of right to free and compulsory primary education as a fundamental human right.

In keeping with the rubric of this thesis, chapter four narrows the research focus to the case study educational development in Nigeria. In order to provide a context for the discussion, chapter four elucidates the three main types of education recognised in Nigeria, namely, traditional, Islamic and formal education with focus on formal education. It also highlights educational development starting from the pre-independent period, through the transition to independence, to the independent era, the post-independent, up to the present government noting the role each successive government played in educational development in Nigeria. This study reveals factors that have been the drivers and inhibitors of the implementation of free primary education since independence. Chapter four specifically points out the need for international financial institutions, notably the World Bank and the International Monetary Fund, to pay greater attention to the protection of the right to education in their lending policies, credit agreements, structural adjustment programmes and measures taken in response to the debt crisis. Also in chapter four, the various attempts at the implementation of Universal Primary Education (UPE) programmes in Nigeria are analysed to highlight the reasons for their unsustainability. The chapter further gives a critical and comprehensive examination

of challenges and obstacles to various initiatives to realise free primary education in Nigeria and how implementation of free and compulsory primary education in Nigeria has been hampered by the problems of political instability, inadequate funding, hurried planning and inaccurate data, lack of proper monitoring, corruption and lack of accountability.

Chapter five considers relevant Nigerian laws. The right to free and compulsory primary education is not constitutionally protected and the provision of primary education has been understood to be a matter reserved primarily to the states and local governments. It is pointed out that with constitutional silence about right to education, the Nigerian legal structure has placed access to free primary education out of the reach of vast number of children in Nigeria. It is argued that there is no effective constitutional guarantee of free education, suggesting that a truly national effort spearheaded by the executive, legislative, and the judicial arms of the government is needed in order to embed the right into the constitution and make it enforceable. Chapter five identifies the national perspectives on free compulsory primary education as presented in other municipal laws and policy documents to offer additional insights into the influences on the outcomes of the policy texts and of national perspectives on UPE policy. The chapter discusses at length the domestic application of the African Charter on Human and Peoples' Rights (ACHPR) in particular Article 17 which provides the right to education. The administration of primary education in Nigeria is also scrutinised in this chapter. The State's budgetary allocation on education is analysed. Budget analysis can help to quantify the steps that the state is taking to progressively achieve the full realisation of the right to education. Human rights standards on education include clear prioritisation which should be reflected in budget allocation because a government's inappropriate expenditure can actually be one of the causes of violations of the right to education. The financial limitations faced by the state are highlighted in the chapter, because external support will be required supported by donor funding in its free primary education initiative. It is for this reason that the possibility of international cooperation and international assistance has also been addressed in this chapter.

Chapter six is a comparative study of the implementation of free education in Kenya and Ghana with Nigeria. This component highlights examples of good practices and successful policies which have proven effective for these other two nations. This contribution offers additional insights into the influences on the outcomes of the legal and

policy texts and of national perspectives on UPE policy in the various countries. This chapter also reviews the evolution of education policies in Ghana and Kenya in a historical context. This is then contrasted with the implementation of UPE in Nigeria. The countries examined were selected purposefully because they are all linked by common similarities being all former British colonies. The three jurisdictions' common variations in their constitutions will be highlighted to show how each jurisdiction has evolved towards enforcing the rights of their children especially the right to free primary education. The experiences of Kenya and Ghana show that the full elimination of fees at the primary level can have dramatic results in enrolment into schools.

Chapter seven synthesises the arguments and findings of chapters two to six, drawing together the arguments made in the thesis in order to draw final conclusions. It further analyses and discusses the findings and the evidence that has emerged from the study. It revisited all the identified obstacles to implementation of free and compulsory primary education in Nigeria which have been discussed in the previous chapters. Finally in chapter seven, on the basis of the completed research, an evaluation is made of the guarantee of free basic primary education for children in Nigeria. This chapter also considers issues for the future implementation of children's right to education in Nigeria and makes recommendations for future improvements for the implementation of children's right to education in Nigeria. In sum, the chapter concludes with a summary of the main points, as well as policy implications. It provides the main conclusions set against the key research questions, personal reflections on the successes and challenges of the research and possible issues for future research on the subject.

Chapter Two

Concept of Children's Right to Education and Right to Education as a Human Right

2.1 Introduction

This chapter sets the general context of the thesis by engaging with the concept of children's right to education and the right to education as a recognised human right. It first defines and analyses the key concepts of education under international human rights law, namely; 'free' education, 'compulsory' education, 'primary' education and 'child', in order to give a clear conceptual understanding of these key words in the thesis. The chapter also seeks to give an overview of the perception of children as rights holders under international human rights law, and especially under African traditional settings. It further seeks to examine culture in relation to rights with a view to show its interrelationship with human rights, arguing that culture must be in conformity with international human rights standards, pointing out that all human beings are entitled to a dignified life and survival anywhere in the world. Since children too are human beings, human rights generally in addition to child-specific rights are their entitlement irrespective of their geographical location. The chapter further engages critically with the scope of relevant international human rights instruments and national human rights provisions that protect the right to free and compulsory primary education. It also argues for right to education as part of customary international law therefore the denial of a free primary education to children is thus a clear violation of this customary right under international law.

Relevant provisions on education in international and regional human rights instruments include Article 26 of the UDHR, Article 1 of the UNESCO Convention against Discrimination in Education (1960), Article 13 of the ICESCR, Articles 28 & 29 of the CRC, Article 17 ACHPR and Article 11 of the ACRWC. Nigeria has ratified all the listed human rights instruments that are legally binding.¹ This list of instruments reveal that the child's right to free and compulsory primary education is one of the most protected rights in international law. Furthermore, from the perspective of human rights, education is fundamental, as it enables individuals to be aware of the rights they have and empowers them

¹ Nigeria ratified; ICESCR and ICCPR on 29/07/1993, CRC on 19/07/1991 and ACRWC on 23/06/2001 available: <http://www1.umn.edu/humanrts/research/ratification-nigeria.html> [accessed 12 January 2014].

to be able to demand these rights. The importance and the role of education of the child cannot be underestimated; it is a principal factor in preparing a child for its future role in the development of his or her nation. Education is ‘both a human right in itself and an indispensable means of realising other human rights’² Many human rights can only be accessed through education, such as the right to health, freedom of expression and freedom from discrimination, therefore education is the ‘key’ that unlocks other human rights.³

This chapter is laid out into four sections. The first section is on definition of terminologies and also examines the arguments by developing countries on the viability of implementing free primary education. Since it is the right of the child to education that is being examined, the second section highlights the notion of children’s human rights and the reasons why children are often denied their rights, examining the arguments of the advocates and opponents of children’s rights. The next section is complementary to section two; it examines the challenges of implementation of children’s rights in developing countries based on the concepts of ethical imperialism, which thus have an effect on children being seen as right holders. The final section analyses the rights of children in the various human rights instruments, highlighting the relevant provisions on the right to free and compulsory primary education in each of these instruments. It also analyses the right to education as a customary international law in view of its recognition in several human rights instruments and in the constitutions and laws of several countries, showing the importance of this right.

2.2 Defining Concepts

Article 13 (2) (a) of the ICESCR provides that:

The State Parties to the present Covenant recognise that, with a view to achieving the full realisation of the right to education: (a) *Primary education* shall be *compulsory* and available *free* to all.⁴

The concepts of ‘free’, ‘compulsory’ and ‘primary education’- need further discussions and definitions, as there is the need to clarify what is meant by free compulsory primary education. As formulated in article 13 (2) (a) of the ICESCR, primary education has two

² CESCR *General Comment 13 The Right to Education, (art13)*, E/C.12/1999/10, 8 December 1999, para 1.

³ Tomasevski, K., ‘Removing obstacles in the way of the right to education’ *Right to education Primers No1*, (Gothenburg: Novum Grafiska AB 2009), p.9.

⁴ Emphasis added.

distinct features: it shall be compulsory and available free to all.⁵ As fee-paying education is not merely about tuition, but involves much more, an examination of the definition of ‘free’ in respect of primary education is undertaken to see how states utilise it.

‘Free’ Education

There is virtually no internationally comparable information on the costs of nominally free public education which families, or the children themselves, have to bear. Because there is no information on the real costs of supposedly free education, it cannot inform global financing strategies. Also, there is no agreement on the meaning of ‘free’, and, even less so, on the corresponding public responsibility to finance compulsory education. The most important reason is the lack of global consensus that primary education should be a public responsibility because this would entail major changes in financing strategies.⁶ In most sub-Saharan African countries monetary policies are influenced by the macro-economic policy and preferences of the IMF. If a government does not respect the policies agreed to in a loan, the IMF will stop loan disbursements which will send a signal to donors and private companies that the country is economically unstable. It is estimated that to make primary education free in all areas huge budgetary allocation will be involved, but the caps agreed through IMF loans are barriers to making primary education completely free and thus accessible to children in loan recipient countries. Cost sharing in guises such as registration fees, school maintenance, charging students for desks, textbooks and contribution towards various infra-structure projects or development levies, are encouraged by policy makers because the use of these fees fit in with the structural adjustment programs advocated by the IMF and World Bank as a means of achieving macroeconomic stability.⁷ The resultant effect is that parents who cannot pay fees may be forced to keep all or some of their children out of school. This leads to a conclusion that the financial strategies are moving in a direction which is jeopardising a rights-based approach to education due to the influence of the Bank.

The ICESCR Committee has defined the nature of the ‘free of charge’ requirement as being unequivocal.⁸ It stated clearly in its General Comment 11 that:

⁵ CESCR *General Comment No 13 (1999) The Right to education*, note 2 para10.

⁶ Tomasevski, K. *Education Denied: Costs and Remedies* (London: Zed Books, 2003) p.70.

⁷ Alexander, N, ‘Paying for Education: How the World Bank and the International Monetary Fund Influence Education in Developing Countries’, (2001) 76: (3&4), *Peabody Journal of Education*, 285-338, at 322.

⁸ CESCR *General Comment No 11 (1999) Plans of Action for primary education (art 14)* E/C.12/1999/4. 10 May 1999, para 7.

The right is expressly formulated so as to ensure availability of primary education without charge to the child, parents or guardians. Fees imposed by the government, the local authorities or the school, and other direct costs, constituted disincentives to the enjoyment of the right and may jeopardise its realisation. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not) or the obligation to wear a relatively expensive school uniform can also fall into the same category.⁹

Indirect costs are costs that are not directly related to the provision of education but arise from the educational service and can include payment for transport, school meals, school uniforms and sporting equipment. They can also extend to levies on parents, which are sometimes portrayed as being voluntary when in fact they are often compulsory, therefore arguably amounting to direct costs. Although the ICESCR Committee has indicated that: '[o]ther indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis',¹⁰ it is submitted that a range of indirect costs can act as a significant constraint to children accessing Universal Primary Education (UPE). In this respect the ICESCR Committee has highlighted that where relatively expensive school uniform (frequently one of the most costly items) is mandatory; the state should address it, so that no child is excluded on this ground.¹¹ To make education free, all direct and indirect, and opportunity costs would have to be identified so as to be gradually eliminated through their substitution by public allocations. Tomasevski has pointed out that this will require increased and guaranteed public funding by the creditors and donors, for which she says there is simply no commitment.¹² Tomasevski further raised two issues about this; firstly, imposition of charges in public primary school exclude all those unable to pay them, thus contradicting the legal human rights requirement that education should be free for all primary-school age children so that it can be made all-encompassing and compulsory. Secondly, that it is a common fact that human rights rationale supports poverty alleviation, therefore, direct charges in public education will hinder the attainment of education for all by excluding the poor, thereby foreclosing their principal pathway out of poverty.¹³ In many African countries, direct charges in nominally free public schools were opposed only where levied by the central

⁹ *Ibid*

¹⁰ *Ibid*.

¹¹ *Ibid*

¹² Tomasevski, K. 'Not Education for All, Only Those Who Can Pay: The World Bank's Model for Financing Primary Education', 2005 (1) *Law, Social Justice & Global Development*, (An Electronic Law Journal) p.3 available http://www.go.warwick.ac.uk/elj/lgd/2005_1/tomasevski, accessed 15 April 2013.

¹³ *Ibid* pp.3&4.

government, exempting those informally levied by local communities or schools.¹⁴ In countries where states do not receive adequate funding for education from the central government, such states may try to make money in other ways, for example by charging registration fees and exam fees, this leads to informal charges to parents at the school level in supplementing funding for public schools.¹⁵

For economic accessibility, education has to be affordable to all, and primary education shall be available ‘free to all’.¹⁶ In rights- based approach to education, school fees should be removed so that education can be made available, this means free tuition, free text books and no indirect charges or levies must be charged for access. Ultimately, it is submitted that these prohibitive extra costs prevent children from accessing schooling even where tuition is free. The requirement upon states to make primary education free implies that the state should eliminate all such financial obstacles in order to enable all children, no matter how poor, to complete primary schooling. Despite the ICESCR Committee’s elaboration of the requirement of “free of charge” in its General Comment 11, a conclusive definition for the concept of ‘free’ which could be regarded as acceptable by the majority of states has not been laid down and continues to be debated. In the relevant human rights instruments there is still no single universal definition of the word ‘free’ education. Nevertheless, the rock-bottom reality is that all children who live in States which are party to either, ICESCR, CRC or ACRWC are entitled to receive free primary education. States are to ensure the availability of primary education without charge to the child or the parents.¹⁷

‘Compulsory’ Education

Compulsion in free primary education requires all those with responsibilities towards the child – the state, its agents and parents or guardians to ensure that the child accesses primary education, subject to the state meeting the necessary adequacy requirements in relation to quality, relevance and affordability. Beiter has pointed out that, compulsory education entails obligations at two levels: on the one hand, states parties are to ensure that enough schools are available so that all children of primary school age can go to school. On the other hand, parents must not keep their children away from school and must secure attendance at

¹⁴ Tomasevski, K, *The State of the Right to Education Worldwide Free or Fee: 2006 Global Report*, p. xix, available at http://www.katarinatomasevski.com/images/Global_Report.pdf/ (accessed 17 June 2014).

¹⁵ Tomasevski, ‘Not Education for All, Only Those Who Can Pay’, note 12, p.4.

¹⁶ CESCR General Comment No 13, para 6(b) (iii).

¹⁷ CESCR General Comment No 11

school.¹⁸ Fulfilling the compulsory obligation clearly requires states to have effective monitoring and follow-up procedures in place. A more problematic issue is how to sanction parents who are seen to be failing in their responsibility to ensure the attendance of their children. For example, parents in Nigeria may be fined or even imprisoned if they fail to fulfil their legal obligation in ensuring that their child attends and completes his or her primary education.¹⁹ There has, however, been no known case of such prosecution. On this point of ‘compulsory’ education the CRC offers no specific guidance, beyond requiring states to encourage school attendance, it does not discuss enforcement.²⁰ Children too owe a duty to attend school regularly. To punish children for breaching their duty to attend school, some states have created the offence of truancy.²¹ Also the European Convention on Human Rights (ECHR) provides for detention of a minor by lawful order for the purpose of educational supervision.²² On the other hand, many children in Nigeria would like to be able to attend compulsory education but finance is a barrier. Making education compulsory places the obligation squarely on the state to ensure that all obstacles to children’s attendance are removed. In essence, education has to be free as the state cannot make it compulsory for all if it charges directly or indirectly for the services. Thus the state must first create conducive conditions for education and when these standards are met, parents then have the obligation to ensure that their children attend school. Primary education could hardly be made compulsory unless it was first made generally available, which includes making it fully free.²³

‘Primary’ Education

In relation to foundational education, terms such as ‘elementary’, ‘primary’, ‘fundamental’, or ‘basic’ are often used interchangeably, but they connote different meanings legislatively. The UDHR proclaims that ‘Everyone has the right to education’ and that elementary and fundamental education shall be ‘free’.²⁴ Now, the twin notions of ‘elementary and fundamental education’ have been overtaken by the notion of ‘basic education’.²⁵ The term ‘fundamental education’ has largely gone out of use today, at least in international debate and

¹⁸ Beiter, K.D., *The Protection of the Right to Education by International Law*, (Leiden: Martinus Nijhoff Publishers 2006) p.311.

¹⁹ S. 15(6) CRA.

²⁰ Art 28 (1) CRC.

²¹ Tomasevski, *Education Denied*, note 6, at pp 46-48.

²² Article 5 (d) ECHR

²³ Art 28 (1) (e) CRC.

²⁴ Article 26 UDHR

²⁵ UNESCO, *World Education Report 2000: The right to education: towards education for all throughout life* (Paris: UNESCO Publishing 2000) p.26.

discussion about education, but at the time when the UDHR was drawn up, it was more in vogue. It was included in the Declaration specifically in order to recognize the right to education for illiterate adults and others who had not had the opportunity when they were young to receive a full elementary education.²⁶ For the definition, it is necessary to consider the main points of debate during the drafting of the paragraphs of article 26. How was the wording of the first paragraph arrived at? What arguments were used in favour of one set of words rather than another? It had been proposed to the UN Third Committee that ‘free and compulsory’ should apply to both ‘elementary’ and ‘fundamental’ education, but the Third Committee decided to draw a distinction between the ‘elementary’ and ‘fundamental’ stages of education, and to apply the term ‘compulsory’ only to ‘elementary’ education.²⁷ The distinction that was drawn between the terms ‘elementary’ and ‘fundamental’ was a substantive though subtle one. At the conclusion of the Human Rights Commission’s work, the paragraph was reworded to become ‘Elementary and fundamental education shall be free and compulsory’.²⁸ Although, it is clear from the discussion that the two terms ‘elementary’ and ‘fundamental’ meant different aspects of the same thing, depending on whether the focus was on children or adults, but it is reasonable to confine the term ‘compulsory’ to elementary education. It would be impossible to apply compulsion to adults who had failed to obtain elementary education in their youth; they might not have the time or facilities to attend school.²⁹ In contrast to ‘fundamental education’, ‘elementary education’ had a relatively clear interpretation in most countries at the time when the UDHR was proclaimed. At least, it could be understood in practice to refer to the first stage or level of formal education.³⁰ Most human rights documents though, still refer to ‘primary’ education.³¹

The ICESCR Committee in paragraph 9 of its General Comment No.13³² remarked that it obtains guidance on the proper interpretation of the term ‘primary education’ from the World Declaration on Education for All’.³³ It refers to articles 1(1) and 5 of the Declaration. Article 5 states, *inter alia*:

²⁶ *Ibid*

²⁷ Official Records of the Third Session of the General Assembly, Part I, *Social, Humanitarian and Cultural Questions, Third Committee, Summary Records of Meetings*, 21 September –8 December, 1948, (E/CN.4/AC.2/SR.8), New York: United Nations, Lake Success, (1949) ,p.583.

²⁸ *Ibid*

²⁹ *Ibid*

³⁰ UNESCO *The World Education Report 2000*, note 23 at p.38.

³¹ Reference to ‘primary education’ can be found in Arts13&14 ICESCR, Art 28 CRC and Art 11 ACRWC.

³² CESCR, *General Comment No 13*.

³³ UNESCO, *World Declaration on Education for All and Framework for Action to meet Basic Learning Needs*, held in Jomtien 5-9 March 1990. Article 1, available at <http://www.unesco.org/education/wef/en-conf/Jomtien%20Declaration%20eng.shtm> accessed 17 June 2014.

The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community. In this context, primary education of children is tied to formal schooling that determines the contents and the level of education which applies to children of a specific age group. The basic learning needs contents are not only the basic reading and writing skills, but includes wider concept of instructions to pave the way for a lifelong education.

A series of global meetings starting in Jomtien, Thailand, in 1990 attempted to revive the political will of states to provide access to basic education for all children. Commitments were restated 10 years later at the global conference in Dakar in 2000.³⁴ According to the International Standard Classification of Education (ISCED), basic education comprises primary education and lower secondary education.³⁵ This is borne out by recent developments in national legislations in line with EFA goals.³⁶ The concept of basic education came to the fore following the adoption of the World Declaration on Education for All (1990).³⁷ In its Report presented to UNESCO “Learning: The Treasure Within” (1996), the International Commission on Education for the Twenty-first century, stated that;

Basic education is the first step in attempting to attenuate the enormous disparities affecting many groups – women, rural populations, the urban poor, marginalized ethnic minorities and the millions of children not attending school and working.³⁸

Basic education is of a 9-year duration, comprising 6 years of primary education and 3 years of junior secondary education.³⁹ In Nigeria, the 2004 Universal Basic Education Act⁴⁰ provides that basic education which is of 9 year duration shall be free and compulsory.⁴¹ The implementation of which is doubtful, since the state has not been able to sustain financially free primary education of six year duration, to extend free education to nine years is too ambitious and unrealistic. The concept of basic education has led to the broadening of the magnitude of the right to education. Tomasevski argues that this trend follows a twofold rationale: Firstly, raising the school leaving age through prolonged compulsory education

³⁴ World Conference on Education for All: The Dakar Framework for Action, adopted by World Education Forum, Dakar, Senegal, 26-28 April 2000, ED-2000/CONF/211/1 –available at: <http://www.unesco.org/education/wef/en-conf/dakframeng.shtm> accessed 17 June 2014.

³⁵ UNESCO International Standard Classification of Education (ISCED) (1997), para 52.

³⁶ Dakar Framework for Action note 34.

³⁷ *Ibid*

³⁸ The International Commission on Education for the Twenty-first century: The Report of the Commission presented to UNESCO ‘Learning: The Treasure Within’, *Report to UNESCO of the International Commission on Education for the Twenty-first Century* (Paris: UNESCO 1996), p. 118.

³⁹ S.3 National Policy on Education, (2004).

⁴⁰ The Compulsory Free Universal Basic Education Act No 66 of 2004, also known as UBE Act.

⁴¹ S.2 UBE Act.

prevents children from venturing into adulthood too early, which is particularly important in combating child labour and child marriage. Secondly, prolonged compulsory education provides all children with learning and skills, which is important in the integrated communities and will provide foundations for all-encompassing societies.⁴² But the question is whether developing countries are able to realistically make this fully free. This study therefore focuses on and argues for the full implementation of free and compulsory primary education in Nigeria, which is a more realistic aim.

In clarifying the meaning of ‘primary education’, reference may also be made to UNESCO’s ISCED, which states the main criterion of primary education as the beginning of systematic apprenticeship of reading, writing and mathematics.⁴³ The age of entrance is not younger than five or older than seven years. Primary education covers six years of full-time schooling. It is the start of compulsory education.⁴⁴ In Nigeria, primary education begins at the age of six and students spend six years in primary school.⁴⁵

The ‘Child’

There is the need to define who a child is in order to ascertain the beneficiary of the right to education under this study. Even though the ACRWC defines a child as a person below the age of eighteen years, this is at variance with the definition under the African traditional setting where attainment of a particular age is not the only way in which the duration of childhood can be measured. Factors such as the ability to perform certain feats and particular functions such as initiation rites are the more important considerations in African communities.⁴⁶ In the traditional African setting, childhood and when it comes to an end is not so much a question of fixed age but is influenced by a number of factors, such as attainment of status. For example, childhood ends upon marriage. Once married, the child is regarded as an adult who will be responsible for running a family irrespective of the fact that the child might have married at an early age (this is pertinent with the female child).⁴⁷ Early marriage of the female child is of particular relevance in this regard, because it is a barrier to access to education for the girl child. In the African sense, the definition of a child is a communal assessment. It is not calculated in terms of age by birth but by the role the child

⁴² Tomasevski, *Education Denied*, note 6 at p.27.

⁴³ S.9 ISCED Level I para 120, International Standard Classification of Education (ISCED) 2011, (Montreal: UNESCO Institute for Statistics 2012) available at <http://www.uis.unesco.org/Education/Documents/isced-2011-en.pdf> accessed on 12 January 2014.

⁴⁴ UNESCO, ISCED, note 35, paras 45-51.

⁴⁵ National Policy on Education 4th edition (2004) para 17.

⁴⁶ Omari & Mblinyi, *African Values and Child Rights: Some Case from Tanzania*, (Dar-es-Salam: DUP 2000) p 7.

⁴⁷ Falola, T., *Culture and Customs of Africa*, (Connecticut: Greenwood Resources 2001) p. 10.

can play or plays in the society at any given stage. So the definition of a child is dictated by situational factors under African traditional settings. Different communities all have different structures, legal procedures and institutions, thus cessation of childhood takes different forms in various communities.

The CRC defines a child as any human being under eighteen unless under laws applicable to the child, majority is attained earlier.⁴⁸ The CRC definition must have been enthused by the awareness of the fact that various communities view duration of childhood differently. The fear in this definition is that it may be used to deny children the rights under the Convention, including their right to education in some communities. The ACRWC however defines (without any qualification), a child as any human being below eighteen years.⁴⁹ Under the two international instruments, age is the sole dominant factor for being a child. The definition of the child is perceived and construed around an entity age as opposed to under the African tradition where the definition of a child is determined by a quality or fact. In essence, there is no agreement on the definition on the traditional definition of a child in sub-Saharan Africa. Each community in the cultural settings have different age ranges for childhood. Region-wide agreement on the definition of a child is the definition contained in the ACRWC.⁵⁰

There are challenges posed by plurality of the African legal systems. African customary law is recognised as law in all African states alongside the received Western system of law.⁵¹ This is as a result of the continent's colonial heritage. The received laws of the colonial masters were introduced and a large portion of the indigenous legal system (as long as it passes the repugnancy test) was retained. So in most countries, customary law operates in the area of family law, succession and land law.⁵² Under customary law, the minimum age of marriage is lower than eighteen.⁵³ As long as there exists these differences the gap between law and practice remains wide. The reason why the issue of definition of a child based on age is discussed here is because child-marriage is common practice under the customary law. On contracting marriage, childhood ceases, even when the party is less than eighteen years of age. The resultant effect is that such a child cannot exercise his/her right to free education. However this thesis will adopt the definition of the child as provided under the CRC and the

⁴⁸ Art 1 CRC

⁴⁹ Art 2 ACRWC

⁵⁰ *Ibid.*

⁵¹ Park, A.E. *The Sources of Nigerian Law*, (Lagos: African University Press 1976) p.18.

⁵² Obilade, A., *The Nigerian Legal System*, (London: Sweet and Maxwell 1979), p.10

⁵³ In Nigeria there is no fixed minimum age of marriage under Customary law. Among Yorubas in South West Nigeria marriageable age is between 14 & 16 years. In Northern Nigeria can be married at 13 or 14. See Sagay, I. *Family Law in Nigeria*, (Lagos: Malthouse Law Books, 1999) p. 822.

ACRWC that a child is defined as a person who has not yet attained the age of eighteen regardless of his/her marital status.

2.3 Arguments on the Sustainability of Free Primary Education by Developing Countries

It is often argued that free education is unsustainable for most developing countries due to lack of adequate resources. Bray has argued in that regard that financing primary education fully by the state is unaffordable because government cannot afford to provide the necessary funding needed to deliver adequate education service.⁵⁴ He gave examples of countries like Nigeria, Ghana and Kenya that had made attempts to abolish school fees in the 1960s and 70s, but found these policies to be unsustainable.⁵⁵ Some African governments have argued that insufficient resources exist for realising economic, social and cultural rights and that realisation of these rights is aspirational and a complaints procedure to enforce them will force unrealistic choices on states. It is hereby submitted that no state that is seriously committed to education for its children will be thwarted in the realisation of this goal by an argument about lack of resources. Where a state party is lacking in financial resources, it is required to work out a detailed plan and the international community has a clear obligation to assist.⁵⁶ Ssenyonjo points out that developed nations have consistently denied the existence of any definite obligation to assist developing countries with resources.⁵⁷ He says such assistance is not a legal entitlement.⁵⁸ Notwithstanding, there is a reasonable consensus regarding the fact that the social returns to education are decreasing, but this does not negate the need to ensure access to primary education. Governments are primarily responsible for ensuring that access to primary education is universalised and not denied to any child. It is incumbent upon every state to mobilise resources for this purpose. In order for a State Party to the ICESCR to be able to attribute its failure to meet its core obligations under Article 13(2) (a) to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, these *core obligations*.⁵⁹ No doubt, financing primary education is a stupendous

⁵⁴ Bray, M. 'School fees- Philosophical and operational issues', In: M. Bray & K. Lillis (eds), *Community financing education; issues & Policy Implication in Less Developed countries*, (Oxford: Pergamon Press, 1988), 55-74 at 60.

⁵⁵ *Ibid*

⁵⁶ CESCR General Comment 11, note 8, para 9.

⁵⁷ Ssenyonjo, Manisuli, 'Reflections on state obligations with respect to economic, social and cultural rights in international human rights law', (2011) Vol. 15, No. 6, *The International Journal of Human Rights*, 969-1012 at 983.

⁵⁸ *Ibid*

⁵⁹ CESCR General Comment No. 3, *Nature of States Parties Obligations*, Article 2 para 1 on the Covenant, (1990), E/1991/23, para. 10.

undertaking by state as it will cost large sums of money, but the state will have to re-prioritise its spending so that more resources are invested in education and, where necessary, seek aid from richer states.

There is also the argument that if school fees are charged, it would be an effective way to improve or maintain quality in public schools. Indeed, removing direct charges has seen surges in enrolment in developing countries, often into educational systems whereby schools have not been able to cope.⁶⁰ For example, Bold *et al.*, in their study on Kenya in 2011, discovered that, in the wake of 2003 Free Primary Education in Kenya this resulted in the influx of pupils into the public schools, and facilities such as school materials, furniture, toilet facilities and classrooms were inadequate to accommodate the number of pupils that enrolled.⁶¹ They concluded that, as a result of the surge in enrolment, quality of public education decreased, leading to a significant increase in the demand for private schooling by children from wealthier households.⁶² Also, in the Democratic Republic of Congo (DRC), Amnesty International has expressed concern that “financial simulations presented in the World Bank document on how to cover the government financing gap from the removal of primary education charges include reducing the number of secondary schools by up to 28 per cent”.⁶³ Such measures, if adopted, would amount to retrogression on the part of the DRC in meeting its human rights obligations to ensure that secondary education is progressively available and accessible and to continuously improve the material conditions of teachers.

While it may be true that State funding alone can lead to decline in the quality of education provided in developing countries, this should not be used as a reason to limit access to school through the imposition of fees. This will be contrary to the state party’s obligation under the international human rights law. It will also be retrogression by the state. It is the obligation of States to ensure that the quality of education does not suffer from its free-of-charge character. Human rights safeguards for education encompass not only its quantity but quality as well. The argument that school fees may be necessary to ensure the quality of primary education is therefore unacceptable. Imposing fees may lead to the further exclusion of

⁶⁰ Oketch, Moses & Anthony Somerset, *Free Primary Education and After in Kenya: Enrolment impact, quality effects, and the transition to secondary school*, (Create Pathways to Access, Research Monograph No. 37) (Sussex: University of Sussex May 2010) p.1.

⁶¹ Bold, *et al.*, *Does Abolishing Fees Reduce school Quality: Evidence from Kenya*, (CSAE Working Paper Series) (Oxford: University of Oxford, April 2011) p.20.

⁶² *Ibid*

⁶³ Report of research conducted by Amnesty International during 2005 and 2006, including through visits to regions of eastern DRC and the capital, Kinshasa. Available at <http://www.amnesty.org/es/library/asset/AFR62/017/.../afr620172006en.html> accessed 2 March 2013

socially and culturally marginalized groups, as children from poor families who are unable to pay the fees will remain deprived of education. These groups are the dominant in most developing countries including Nigeria.

Thobani has suggested that the effect of school fees on children from poor households can be mitigated through measures such as scholarships, which will target the neediest children for whom the cost of schooling might be prohibitive.⁶⁴ Klees has however pointed out that in practice, exemption schemes for poor children have always proven difficult to implement.⁶⁵ This, Reddy and Vandermootele attributed to a number of factors such as; social stigma associated with availing of exemption programmes, difficulty in accurately identifying those who are actually in need, partiality in granting the exemptions such that those who should benefit are not given.⁶⁶ The truth is that fees charged in primary schools have always had little impact in improving the quality, especially in rural areas, where not much can be collected from families. A fundamental argument for state providing free primary education for its children is that education carries with it a number of benefits which are greater than cost benefit calculation made with regard to schooling. Benefits associated with education are not in doubt, and actually quantifying these benefits is difficult. Many of the benefits of primary education are not only for the child who receives it but also the families and the nation indirectly, though it might not be evidenced immediately. One of the greatest investments a country can make in its economic future is an investment in the education of its children, as this will eventually lead to production of indigenous skilled manpower in the country.

2.4 Recognising the Concept of the Human Rights of the Child

The fact that children are not yet grown up has been and is used as an excuse by parents, teachers and many other adults, particularly in Africa, to follow their own interpretation of the child's interest. Up to 1970s, most people still considered children as a special category and did not think of the meaning of human rights for children and the application of these fundamental rights to children. It is quite clear that the most basic rights of children are in fact still massively violated, in families and in schools, in jobs, or on the street, in form of

⁶⁴ Thobani, M., 'Charging Fees for Social Services: Education in Malawi', (1984) 28 (3) *Comparative Education Review*, 402-423 at 410.

⁶⁵ Klees, S. J., 'The need for a Political Economy of Education Finance: A Response to Thobani' (1984) 28 (3), *Comparative Education Review*, 424-440 at 425.

⁶⁶ Reddy, S., & Vandermoortle, J., 'User financing of basic social services: A review of theoretical arguments and empirical evidence', *UNICEF staff working paper series, Office of Evaluation, Policy and Planning* (New York: UNICEF 1996), available at: <http://sanjayreddy.squarespace.com/> accessed 2 February 2013.

domestic, physical or sexual abuses, and violence. There are various abuses irrespective of the child's geographical location whether the child lives in developing countries or in the Western World. In the Western World, children may face abuses in the form of pornography or domestic violence, and in the developing World abuses may be in the forms of ignoring the right to freedom of speech, child labour, child soldiering, limited or non-access to education and forced marriage.

According to Van Bueren, since the beginning of the twentieth century, there has been corresponding development of a body of international human rights law and international law on the rights of the child.⁶⁷ She delineated the growth in both bodies into three stages; the first stage which she explained was the recognition by the international community that all individuals, including children, were the object of international law requiring international legal protection.⁶⁸ This is evidenced by the near universal ratification of child rights instruments such as the CRC. The second and the third stages, she explained, are still evolving, which are the granting of specific substantive rights to children and the acknowledgement of their exercise and possession of these rights respectively.⁶⁹ These two latter stages are hindered by the problem of implementation and enforcement of the rights which are more obvious in developing countries. For example, the idea of a totally dependent child who is fed, clothed, educated and generally brought up at the expense of his or her parents, now to be seen as a right holder is a concept which is alien to the traditional African setting.

'The concept that children possess rights is viewed by some as a radical notion and denied by others'.⁷⁰ The denial is based on the belief that if children are acknowledged as right holders, this will cause conflicts of interest.⁷¹ It is rather that until individuals are acknowledged as possessors of rights, they may be forced to suffer intolerable treatment because of the absence of a framework with which to mount a demand.⁷² From a human rights approach, care and protection is not provided to the children as an act of adult goodwill, it is an entitlement of all children without discrimination.⁷³ The child's right goes beyond physical needs. It is sometimes argued that children cannot be rights holders as they

⁶⁷ Van Bueren, G. *The International Law on the Rights of the Child*, (Dordrecht: Martinus Nijhoff Publishers, 1994), p.1.

⁶⁸ *Ibid*

⁶⁹ *Ibid*

⁷⁰ Wald, M. 'Children's Rights: A Framework for Analysis', (1979) 12 *U C Davis L. Rev*, 255 at 256.

⁷¹ *Ibid*.

⁷² Freeman, M. 'The Value and Values of Children's Rights' in: A. Invernizzi & J. Williams (eds) *The Human Rights of Children: From Visions to Implementation*, (Surrey: Ashgate 2011) p .23

⁷³ Bessel, S., & Gal T., 'Forming Partnership: The Human Rights of Children in Need of Care and Protection' (2009) 17 *International Journal of Children's Rights*, 283-298 at 287.

are incapable of making decisions, exercising or waiving their rights.⁷⁴ As a result, children have largely been denied the freedoms that are provided to citizens in democratic societies, so instead of rights, children are granted protections which tend to deprive them of their independence, and emphasise their reliance upon adults.⁷⁵ According to Freeman, where a person lacks entitlement to rights, he will have to depend on the compassion of those who have as he cannot make any claim, but will only be grateful for whatever he is given no matter how insignificant.⁷⁶ Such a person lacks personal worth.⁷⁷ Having a claim to a right is greater than receiving it through compassion or benevolence.⁷⁸ ‘Where rights exist redress is possible’.⁷⁹

2.4.1 Why Children are denied their Rights

Children’s rights have been neglected for numerous reasons: it is argued that adults already relate to children in terms of love, friendship, compassion, altruism and that this raises the relationship to a higher plane than one which relies on rights and duties.⁸⁰ This is not the experience of many children. Several children suffer exploitation, violence and oppression from adults. The image of the suffering child depicts injustice, and giving rights to children will offer a way of protecting the children against the various injustices inflicted on them. Adults say that children, because of their limited level of development, knowledge and experience, cannot judge what is in their interests or what will be the consequences of their thoughts and behaviour.⁸¹ De Langen has explained that the fact that children are not yet grown up has been used and is being used as an excuse by adults (including parents) to follow their interpretation of the child’s interests. At times adults make decisions that have far-reaching consequences for children which no one can anticipate and which might not be in the child’s best interest.⁸²

Another reason why the thought that children should have rights is not taken seriously is because the period of childhood is viewed as a stage whereby one is oblivious of the hardship of adulthood as the child spends his or her time to eat and play under the safety and

⁷⁴ Bayles, M., *Legal Philosophy: An Examination*, (Dordrecht: Kluwer Academic Publishers 1992) p.52.

⁷⁵ Ezer, T., ‘A positive Right to Protection for Children’, (2004), *Yale Human Rights and Development. Law Journal*, 1-50, at 21.

⁷⁶ Freeman, M. ‘The Value and Values of Children’s Rights’ note 72, p 23.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, p. 29.

⁷⁹ Freeman, M. ‘Taking Children’s Rights more Seriously’, 6: *International Journal of Law and Family*, 52-71 at 52.

⁸⁰ Freeman, M. ‘The Value and Values of Children’s Rights’ note 72, p.23.

⁸¹ De Langen, M., ‘Meaning of Human Rights for Children’, in: M. Freeman & P. Veerman (eds), *The Ideologies of Children’s Rights*, Dordrecht/ London: Martinus Nijhoff, (1992), 256.

⁸² *Ibid*

protection of the adult. According to Freeman this impression is a distortion of the truth as children are still subjected to abuse and exploitation.⁸³ There is also the concern that children, given rights will undermine the role of parents in raising their children therefore children having rights is anti-parent and this will have a negative effect on the family unit. This fear is unfounded, as the CRC's preamble recognises that the family is 'the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children'.⁸⁴ The fear is also often raised that children, through child rights instruments, will be enabled to bring law suits against their parents and guardian. But none of the children's rights instruments have such provisions. Seen in this light, adults need to make children and their future happy and secure. Children still remain trapped in the old conception where they are treated as legal objects rather than as legal subjects.⁸⁵

Notwithstanding initial pessimism and in some cases outright cynicism and hostility, the notion that children have rights in both international and domestic law is today relatively well settled.⁸⁶ Nevertheless, the attitude of domination over children has continued to determine the destiny of the African child. So the perception of children as right holders is difficult to realise in such societies. They are a direct challenge to traditional generational power structures. Such changes, it is said, would lead to lack of respect in the African culture. Conversely however, there are in Africa now, lots of child-headed households in HIV Aids endemic areas, where children are in charge and looking after the younger ones. So, the generational power structures have ceased to exist under such circumstances, a child who can head a household should be capable of being a right-holder.

The unanimous adoption in 1989, and entry into force less than a year after in 1990, the CRC has become the most widely ratified of the human right treaties with 198 state parties, willingly endorsed as an evidence of worldwide acceptance of children being right holders. In sum, children are no longer imagined as mere recipients of services or beneficiaries of adult protections. Rather they are right holders, as well as participants in matters affecting them, and therefore should be respected in their individuality.

⁸³ Freeman, M., note 72, p. 24.

⁸⁴ Preamble of the Convention on the Rights of the Child, G.A. Res 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc a/Res/44/25 (1989), entered into force 1990 [hereinafter referred to as CRC].

⁸⁵ O' Donovan, K., *Family Matters*, (London: Pluto Press, 1993) p. 90,

⁸⁶ Franklin B., 'The Case for Children's Rights: A progress report', in: *The Handbook of children's rights: Comparative Policy and Practice*, (London: Routledge 1995).

2.5 Challenges of Implementing Human Rights in African Traditional Setting

Culture has always been used as excuse by several states for non-implementation of human rights including the rights of the child. Culture refers to the beliefs, values, norms, sentiments and practices that give meaning and (at least in favourable cases) value to human lives.⁸⁷ Freeman states further that; 'We cannot respect cultures unless we have reliable knowledge of what these cultures are and we cannot have reliable knowledge of cultures unless the voice of the people is clearly heard'.⁸⁸ Cultures provide (often but not always) a secure sense of identity, self-esteem and therefore wellbeing.⁸⁹ Culture may give meaning and value to human lives, but they may also be contexts of oppression. For example the culture whereby a girl is married off at a young age thereby prevents her from enjoying her right to primary education.

Pollis points out that it is a widely held view that the 'culture argument' is still eagerly exploited by states to justify repressive internal practices and to shield themselves from justifiable criticism for gross human rights violations.⁹⁰ An example is where culture is being used to justify discrimination against girls, whereby male children are given preference to receive education over the female children in many African countries, including Nigeria. Care must be taken not to allow cultural relativism to be deployed to shield certain harmful but well entrenched social practices from external critique, for example, child marriage which prevents children especially the girls from having access to education.

Makau Wa Mutua has noted that in traditional Africa, the concept of rights was founded not on individual but on the community, to which the individual related on the basis of obligations and duties.⁹¹ Prakash Sinha has also noted that the current formulation of human rights contains three elements which reflect Western values and make it ill-suited to some non-Western societies. Firstly, the fundamental unit of society is conceived as the individual, not the family. Secondly, the primary basis for securing human existences is through rights not duties. Thirdly, the primary method of securing rights is through legalism where rights

⁸⁷ Freeman, M. 'Human Rights and Real Cultures: Towards a Dialogue on Asian Values', (1998) 16 (1) *Netherlands Quarterly of Human Rights*, 25-39 at 29.

⁸⁸ *Ibid* at 30

⁸⁹ Avishai Margalit & Raz, Joseph, 'National Self Determination', (1990), 87(9) *Journal of Philosophy* p.439.

⁹⁰ Pollis, A., 'Towards a New Universalism: Reconstruction and Dialogue', (1998) 16 *Netherlands Quarterly Human Rights*, 5-19 at 17.

⁹¹ Mutua, M., 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Rights and Duties' (1995), 35 (2) *Virginia Journal of International Law*, 341-342.

are claimed and adjudicated upon, not through reconciliation, repentance or education.⁹² These, according to him, are not the elements in the non-Western societies.

It is often argued on these bases that if international human rights are to be effective, the individual, his culture, his beliefs and his values, must become a constitutive of international human rights law and international society as a whole. In other words, the whole system must undergo a fundamental transition from 'a society of States to a society of humankind'.⁹³ To this Jackson has reacted that such fundamental change is nothing more than a distant utopian dream.⁹⁴

In Africa, states are often too weak, even if in favour of better human rights protection to overcome contrary cultural practices, especially if these are deeply engraved and widely dispersed. Therefore, to be effective those at the grassroots must accept and embrace the human rights norms in question 'as theirs' and they must be culturally legitimate. This can succeed if the heads of the communities who are regarded as the custodian of the culture are the ones used to educate the members of the community on the issues of culture and human rights. Implementation and enforceability of law against a background of cultural diversity has always been problematic. If international human rights law is to respond to the charge that it is ineffective, inept and imperialist, genuine cross-cultural acceptance of human rights extending down to the local level is essential,⁹⁵ particularly in respect of the right to education of the female child in the rural communities of Africa, including Nigeria.

Nevertheless, it is essential to emphasise the universality of human rights, including the rights of the child. The Vienna Declaration and Programme of Action⁹⁶ provide clearly that;

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States regardless of their political, economic and cultural systems to promote and protect all human rights and fundamental freedom.⁹⁷

⁹² Prakash Sinha, 'Human Rights: A non-Western View Point' (1981) *Archiv fur Rechts-und Sozialphilosophie*, 67-80 at 77.

⁹³ Allots, P., *'Eunomia: New order for a New World'*, (Oxford: Oxford University Press, (1990) 296-297.

⁹⁴ Jackson, W.D., 'Thinking About International Community, Diversity and a New World Order', in Kenneth W. Thompson (ed), *Essays in Honor of Inis L. Claude, Jr.*, (London: Sage Publications 1994) p.16.

⁹⁵ Harris-Short, S 'Human Rights of the Child and Cultural Relativity, (2003) 25 *Human Rights Quarterly*, 130-181 at 180.

⁹⁶ Vienna Declaration and Programme of Action, UN GABOR, World Conference on Human Rts 40th Sess, 22nd plen mtg, part1 5, UN Doc. A/CONF.157/24 (1993) , reprinted in 32ILM 1661 (1993)

⁹⁷ *Ibid*, para 5.

Sonia Harris–Short has argued that this provision seems to fundamentally undermine the arguments that human rights are the tools of the “West” imposed on the “non –Western” world during a period of political and economic dependence in furtherance of some kind of enduring colonial project.⁹⁸ It is therefore no longer credible to maintain that human rights are foreign and meaningless to much of the world’s population.⁹⁹ At the drafting of the UDHR, western perspectives were not the only ones represented during the formulation.¹⁰⁰ The argument of western ethnocentrism was one of the reasons for the enactment of the African Charter on the Rights and Welfare of the Child following the coming into force of the Convention on the Rights of the Child,¹⁰¹ but the CRC has been ratified by all the states in Africa.¹⁰² Also Ghana, an African state, was the first state party to ratify the CRC.¹⁰³

2.5.1 Children’s Rights and Culture

This section argues the prospect of justifying children’s rights irrespective of their cultural settings. The question is should children worldwide, under the concept of universality, have the same rights or should their rights be tailored to the conditions and circumstances of their societies? There is a significant body of scholarship which remains convinced that children’s rights have to be interpreted and applied with sensitivity and due regard to the diversity of cultural norms and values. This body of opinion is based on the belief that, even though human rights standards and norms are universal in terms of their general formulation, their actual application as well as content has to take cognisance of cultural diversity. The CRC preamble emphasises the need to take due account of the importance of traditions and cultural values of each people for the protection and harmonious development of the child. The requirement to pay deference to the culture of a child is an underlying theme of a rights-based approach (RBA),¹⁰⁴ this is affirmed by Art 30 CRC- the right of the child to learn and use the language, customs and religion of their family, whether or not these are shared by the

⁹⁸ Drinan, R.F. *The Mobilisation of Shame: A World View of Human Rights*, (New Haven CT: Yale University Press 2001) p. xi.

⁹⁹ Harris-Short, note 95, p.130. See also Alvis Jose, ‘The Declaration of Human Rights in Post Modernity’ (2000) 22 *Human Rights Quarterly* 478 at 482.

¹⁰⁰ United Nations, *Official Records of the Third Session of the General Assembly, Part I, Social, Humanitarian and Cultural Questions, Third Committee, Summary Records of Meetings*, E/CN.4/AC.2/SR.8), 21 September –8 December, 1948, , Lake Success: New York.

¹⁰¹ OAU Report of the Intergovernmental Expert Group Meeting on the Draft African Charter on the Rights and welfare of the Child 17-21 April 1990, Addis Ababa.

¹⁰² Somalia, ratified the CRC on 20 January 2015. Available on: http://www.africanchildinfo.net/index.php?option=com_k2&view=item&id=6915#.VMfuXdIvnYo [accessed 25 January 2015].

¹⁰³ <http://treaties.un.org/Pages/Viewdetails.aspx?src=TREATY&mtdsg-no==iv-ii&Chapter==4&lang=en>. [Accessed 23 January 2014]. Ghana ratified the CRC on 5 February 1990.

¹⁰⁴ Mutua, M. ‘Savages, Victims and Saviours: the Metaphor of Human Rights’, (2001) 42: (1) *Harvard International Law Journal*, 201-245 at 210.

majority of the people in the country where they live. It can be inferred that cultural sensitivity is an implied principle of a RBA.¹⁰⁵ Kaime ascertains that as regards the CRC, there is a tension between the merits of adopting a universal legal framework and the wish to protect cultural diversity.¹⁰⁶ He affirms that culture is not a static, unchangeable concept, but that it is shaped and transformed by the actions and perceptions of individual actors.¹⁰⁷ He further argues that the realisation of children's rights should not only entail the incorporation of these rights in national legislation, but also must be translated into their local circumstances.¹⁰⁸ This I agree will enable the effect of the rights to be seen in reality in the children's daily lives.

A child enjoys all the human rights laid down or proclaimed in the constitutions or any other national legislation of the individual countries, and particularly in international conventions or declarations. But the rights of the child are only those human rights that are granted to the child because 'the child by reason of his or her physical and mental immaturity needs special safeguards and care, including appropriate legal protection, before as well as after birth' and this applies to all children.¹⁰⁹ Examples are; the right of the child to the highest attainable standard of health, provision of adequate nutritious foods and drinking water and, subsequently, the right to education. The universality of the rights of children does not mean that those rights should be separated and implemented from their context. Although, due account must be taken generally of the importance of the traditions and cultural values of each specific people for the protection and harmonious development of the child,¹¹⁰ according to Ncube, there will always be culturally determined differences in understanding what conduct, customs and cultural practices are contrary to the child's best interests.¹¹¹

Freeman has pointed out that the recognition of the importance of traditions and cultural values of each people for the protection and harmonious development of the child does not mean that implementation of the rights granted by the CRC should be relinquished if such traditions are inconsistent with the substance of those rights. After all, what is good and right should be continued and developed: what is wrong should be changed in accordance with the

¹⁰⁵ *Ibid*

¹⁰⁶ Kaime, T., *The Convention on the Rights of the Child: A Cultural Legitimacy Critique*, (Europa Law Publishing 2011), p.29.

¹⁰⁷ *Ibid* p.41

¹⁰⁸ *Ibid*. p 40.

¹⁰⁹ Freeman, M. note 72, p. 31.

¹¹⁰ *Ibid*.

¹¹¹ Ncube, W. 'Prospects and Challenges in Eastern and Southern Africa: The Interplay between International Human Rights Norms and Domestic Law, Tradition and Culture', in: Welshman Ncube (ed), *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*, (Aldershot : Dartmouth, 1998) pp1-10.

requirements of universal progress of mankind.¹¹² The CRC is about the child. It sets global standards, but was criticised that it ignored the obvious fact that many different childhoods exist in the world.¹¹³ Yet the African Children's Charter is in many details strikingly similar to the CRC which is an indication of universal acceptance of children's human rights. Article 17 of UNESCO's Recommendation Concerning Education for International Understanding Cooperation and Peace and Education Relating to Human Rights and Fundamental Freedoms,¹¹⁴ states that:

Member States should promote at various stages and in various types of education, study of different cultures, their reciprocal influences, their perspectives and ways of life in order to encourage mutual appreciation of the differences between them.

As Ncube has rightly asserted, the 'cultural fingerprint' should not extinguish the essential core of the right itself, in other words the substantive rights granted are primary over cultural considerations which could negate the essence of the right.¹¹⁵

2.6 Protection of Children's Right to Education under International Laws

Education is one of the most protected rights in international law. The UDHR establishes the right to education, and the ICESCR, CRC, UNESCO and ACRWC contain similar provisions. Each of these documents specifies that education must be compulsory and available free to all children. A historical retrospect is extremely valuable for expounding the various stages that the right to education has passed through, and to show that these human rights instruments and documents are a living reality that has acceptance by the vast majority of states in various parts of the world today.

2.6.1 The Universal Declaration of Human Rights (UDHR) 1948

The UDHR was adopted by the UN General Assembly in Paris on 10 December 1948.¹¹⁶ It proclaims a catalogue of human rights which apply to all human beings and therefore

¹¹² Freeman, M., note 72, p. 27.

¹¹³ Muyila, W., *African Values and Problems of Rights of the Child: A Search for Explanations*, (Copenhagen: Danish Institute of Human Rights 2006).

¹¹⁴ UNESCO, *Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education Relating to Human Rights and Fundamental Freedoms*. Adopted by the General Conference of the UNESCO Paris, France 19 November 1974)

¹¹⁵ Ncube, W., 'The African Cultural Fingerprint?' in: Welshman Ncube (ed) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*, note 123 p15.

¹¹⁶ UDHR adopted 10 December 1948, G.A. Res 217A, (III) U.N. Doc A/ 810 at 71 (1948).

implicitly to children.¹¹⁷ MacDonald noted that unlike the UN Charter, the UDHR does mention children, within the context of declaring the family to be the ‘natural and fundamental group unit of society’ and as such ‘entitled to protection by society and the state.’¹¹⁸ Children were specifically mentioned in Articles 25 & 26. Article 26 sets out the right to education, dealing with access to and aims of education. It sets out as follows: ‘[...] everyone has the right to education, education shall be free, at least in the elementary and fundamental stages, elementary education shall be compulsory’.

In prescribing that ‘elementary education shall be compulsory’, it was arguably the original intent of the UDHR that all young people should complete an education that would satisfy what today are called their ‘basic learning needs’, and not just an education that might happen to be called ‘elementary’. It can be inferred from the provision that children are the main recipients of elementary education which was mentioned here, however, this does not mean that adults too cannot benefit from this right to education as there is no age limit to the acquisition of knowledge. The reference to ‘compulsory’ in this provision according to Rene Cassin the French representative at the drafting of the Declaration was to ensure that no one could prevent children from receiving education or enjoying the benefit of this right, and in cases where parents neglect their children’s education, the State should take up this obligation.¹¹⁹

Quite early in the drafting of Article 26, the question of the education’s purposes and content and the related question of parental choice emerged as central to the task of formulating a conception of the right to education.¹²⁰ Article 26 provides in its second paragraph that; ‘[...] Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedom.’ This was incorporated into Article 13(1) of the ICESCR and Article 29 of the CRC. In the CRC, there was specific mention of the ‘child’ unlike in the ICESCR where the word ‘everyone’ is used which is general. From both instruments it can be inferred that, education is not only the communication of knowledge but also for the development of the human nature. The third paragraph of Article 26 of the UDHR further provides that: ‘Parents have a prior right to choose the kind of education that shall be given to their children.’ This shows that the Declaration recognises the rights of parents to choose the type of education for their children

¹¹⁷ Van Bueren, note 67 at p.17.

¹¹⁸ Mac Donald, A. *The Rights of the Child: Law and Practice*, (Bristol: Jordan Publishing Ltd 2011) p.18.

¹¹⁹ Report of the Working Group on the Draft Declaration on Human Right. Doc. E/CN.4/57, see also Summary Records of Group Meeting, Doc.E/CN.4/AC.2/1 -9

¹²⁰ *Ibid*

according to their conviction. This provision is similar to Article 13(3) of ICESCR. In sum, Article 26 of the UDHR highlights all the main features of education in a democratic set-up. Van Bueren pointed out that, the preamble of the UDHR clearly states that it was intended to be ‘a common standard of achievement for all peoples and all nations’, but because it was adopted by a resolution of the General Assembly, which does not have the power under the UN Charter to make binding decisions on matters other than its own administrative and financial businesses, there are conflicting opinions as to its precise status in international law.¹²¹ She explained that this dispute over the precise legal status of the UDHR has important consequences for the international rights of the child,¹²² including the right to education guaranteed under it. Steiner described the UDHR as the Constitution of the entire human rights movement.¹²³ He also remarked that the Declaration has retained its place of honour in the human rights movement and that no other document has so caught the historical moment or exerted as much influence on the human rights movement as a whole.¹²⁴ The legal value of the UDHR rests on its recognition and acceptance by a large number of states and even without binding legal effect, it has been seen as declaratory of broadly accepted principles within the international community.

2.6.2 Declaration of the Rights of the Child 1959

The UDHR was followed by the Declaration of the Rights of the Child,¹²⁵ which is another important document in the history of the right to education and it is child-specific. At the UN General Assembly on 20 November 1959, the UN gave official recognition to children’s rights by adopting the ten articulated Declaration of the Rights of the Child. It is a much expanded version of the Declaration of Geneva 1924, having ten principles in place of the original five. The Declaration proclaimed that the child should enjoy all the rights set forth in the Declaration without any exception whatsoever and without discrimination.

It is noteworthy that principle 7 addressed the child’s entitlement to receive education which shall be free and compulsory in the elemental stages. It went on further to state the objective of education which is to promote the child’s general culture and develop the child’s abilities to become a useful member of the society. The Declaration used the term ‘entitled’ which is

¹²¹ Van Bueren, note 67, p. 18.

¹²² *Ibid*

¹²³ Steiner, H., Alston P. & Goodman, R., *International Human Rights in Context- Law, Politics, Morals*, (Oxford: Oxford University Press 2007) p. 136.

¹²⁴ Steiner, H. ‘Securing Human Rights: The First half Century of the Universal Declaration and Beyond’, (1998) Sep- Oct, *Harvard Mag* p.45.

¹²⁵ Declaration on the Rights of the Child, G.A. Res 1386 (XIV), 14 U.N. GAOR Supp (No 16) at 19, U.N. Doc. A/4354 (1959).

arguably analogous to the term right.¹²⁶ The principle 7 is seen to be further expanded in the CRC's Art 13.¹²⁷ Also significant is the phrase 'the child must be given' used in the Declaration of Geneva,¹²⁸ whereas the 1959 Declaration of the Rights of the Child stated that 'The child shall enjoy all the rights set forth in this declaration....' This shows a change in the language from persuasion used in the Declaration of Geneva to entitlement or right in the 1959 Declaration. This, according to Fitzgibbon, reflects a change in the treatment of children from being viewed as objects of international law to being perceived as subjects of the international law.¹²⁹ Van Bueren explains that the 1959 Declaration of the Rights of the Child is the 'conceptual parent' of the CRC.¹³⁰ This was further confirmed when Poland submitted the first draft of the Convention to the Commission on Human Rights in 1978, the text was very similar to the 1959 Declaration. Tallying, Alston and Tobin described the 1959 Declaration as ground breaking.¹³¹

Neither the Declaration of Geneva nor the 1959 Declaration was a legally binding international agreement protecting the rights of the child.¹³² Nonetheless, the 1959 Declaration was adjudged by Van Bueren as representing great progress in conceptual thinking of children's rights.¹³³ By 1959 however, children were beginning to emerge no longer as passive recipients but as subjects of international law, recognised as being able to enjoy specific rights and freedoms.¹³⁴ The 1959 Declaration was the springboard for the initiative to draft a Convention.¹³⁵ This is very significant in the development of children's rights.

2.6.3 The Convention against Discrimination in Education 1960

The UN specialised agencies have also contributed in producing Conventions which protect human rights and fundamental freedoms, UNESCO is one of these agencies. The General Conference of UNESCO adopted, on 14 December 1960, the Convention against Discrimination in Education. The Convention entered into force on 22 May 1962 and as at 2010 one hundred states, including Nigeria, have become state parties. The purpose of the

¹²⁶ Cohen, C. 'The Developing Jurisprudence of the Rights of the Child', (1993). 1: 6 *St Thomas L. Rev* p. 9, p.10.

¹²⁷ Convention on the Rights of the Child, G.A. Res 44/25 UN.GAOR, 44th Sess, Supp No49 at167, UN Doc A/44/49 (1989).

¹²⁸ Principle 1. Declaration of Geneva. Declaration of the Rights of the Child, League of Nations O. J. spec sup.23 (1924).

¹²⁹ Fitzgibbon, T. 'The United Nations Convention on the Rights of the Child: Are Children Really Protected? A case study of China's implementation', (1998) 20 *Loy L.A. Int'l & Comp L.J* 325 at 332

¹³⁰ Van Bueren, note 67 p. 14.

¹³¹ Alston, P and Tobin, J., *Laying the Foundation for Children's Rights* (New York: UNICEF 2005), p.5

¹³² Lopatka, A. 'An introduction to the United Nations Convention on the Rights of the Child', 6 *Transnat'l L & Contemp Probs* 251 at 257.

¹³³ Van Bueren note 67 p.12

¹³⁴ *Ibid.*

¹³⁵ Detrick et al (eds), *The UNCRC: A guide to Travaux Prepatiores*, (The Netherland: Martinus Nijhoff 1992) p.34.

Convention is to eradicate all forms of discrimination in education, in other words, it is aimed at ensuring the equality of opportunity for all in having access to education.

Article 1 of the Convention provides that:

...the term discrimination includes any distinction, exclusion, limitation or preference which being based on race, colour, sex, language, religion or other opinion, national or social origin, economic condition or birth, has the purpose of nullifying or impairing equality of treatment in education and in particular: a) Of depriving any person or group of persons access to education of any type or level; b) Of limiting any person or group of persons to education of an inferior standard; c) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

The Convention states that the term education refers to all types and levels of education and includes access to education, the standard and quality of education and the condition under which it is given.¹³⁶ This thesis focuses on primary education which is the foundation of the education of the child. The issue of non-discrimination in education is very vital to the enjoyment of the right to education for the child because there can be discrimination based on gender, ethnicity or physical disability, particularly in Africa. It is noteworthy that the Nigerian Constitution also has specific provision for the protection of the child from any form of discrimination.¹³⁷ There is no known case where the complaints mechanisms of this Convention have been tested or where individuals or groups whose rights to education have been violated have sought relief under the Convention. The UNESCO Convention will be discussed in much detail in chapter three.

2.6.4 The 1966 International Covenants

These two human rights covenants were the first legally binding international agreements, with the ICESCR including the right to education. The ICESCR was the first to enter into force before the ICCPR.¹³⁸ The ICESCR obligates the state to ensure economic, social and cultural rights are enjoyed by all. The ICESCR enshrines in Article 13, the right of every one (including children) to education and obligates that primary education should be free and compulsory to all. State Parties are obligated to implement all the rights in the ICESCR to the maximum of its available resources with a view of achieving progressively the rights

¹³⁶ Article 1(2) Convention against Discrimination in Education

¹³⁷ S. 42(5) 1999 Constitution of Nigeria

¹³⁸ International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec 16 (1966) UNTS 993, (entered into force Jan 3, 1976). International Covenant on Civil and Political Rights, Dec 16(1966) 999 UNTS.171 (entered into force on March 23, 1976).

recognised in the covenant.¹³⁹ It is the ICESCR which is more relevant to this thesis as it provides specifically for the right to education.

The ICCPR complements the ICESCR.¹⁴⁰ Children are entitled to benefit from all the relevant rights contained in the ICCPR,¹⁴¹ and its article 24 specifically adopts special measures for the protection of children providing as follows:

Every child shall have without any discrimination as to race, colour, sex, language religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor on the part of his family, society and the state.

Van Bueren has noted that by virtue of article 24, a child is entitled to special measures of protection in addition to the measures under article 2, which provides that state parties are under a duty to take to ensure that all individuals enjoy the rights enshrined in the ICCPR.¹⁴² Prior to the adoption of the CRC, child rights claims on behalf of juveniles were brought under the ICCPR and ICESCR and both covenants still serve as alternative mechanisms for the recognition and enforcement of children's rights.¹⁴³ The ICCPR requires the immediate application of its provisions, whereas the ICESCR according to its Article 2 provides for the progressive implementation of the rights in the Covenant. The reason is that economic and social rights require State's resources for its implementation hence, they are positive rights, and right to education is grouped under socio-economic rights.

The right to education is protected in Articles 13 & 14 of ICESCR and the ICESCR Committee expounded on the right in its General Comments 13 & 14. article 13(1) also establishes three additional aims of education in addition to the aims under Article 26 of the UDHR, these are; the development of a sense of dignity, the enabling of all persons to participate effectively in a free society and the promotion of understanding, tolerance and friendship among ethnic groups as well as nations, racial and religious groups.¹⁴⁴ Articles 13 (3) contains other important expressions concerning education. The article obliges states to establish minimum education standards for all educational institutions, whether established by states or individuals. All the obligations under article 13 can be summarised under three

¹³⁹ Art 2(1) ICESCR.

¹⁴⁰ Henkin, L., *The International Bill of Human Rights: The Covenant on Civil and Political Rights*, (New York: Columbia University Press, 1981) p. 2.

¹⁴¹ Van Bueren, note 67 at p. 21.

¹⁴² *Ibid* p. 21

¹⁴³ Corcos, C.A. 'The International Law: A Pathfinder and Selected Bibliography', (1991)23 *Case W. Res J.Int'l L.* 171 at 172

¹⁴⁴ *Ibid*

types of obligations – these are obligations to respect, protect and fulfil.¹⁴⁵ Article 14 of the ICESCR requires State Parties to work out and adopt detailed plans for the progressive implementations of the right to education. This provision was only made for the right to education. The reason was because at its drafting, most representatives agreed that the right to education justified the inclusion of a special implementation clause, even though similar provisions were not made with regard to other rights in the Covenant.¹⁴⁶ Still thinking that a child's specific human rights instrument is necessary, Van Bueren argues that because an international instrument is capable of being applied to children does not mean it integrates a definite child centred approach setting out all the rights essential to ensure the protection of children.¹⁴⁷ In other words, she is justifying the need for a child specific international instrument.

2.6.5 Convention on the Rights of the Child 1989

The UN General Assembly unanimously adopted the CRC on November 20 1989.¹⁴⁸ The CRC is the most widely ratified human rights treaty in the world and was ratified by Nigeria on 16 April 1991. Only the United States of America and South Sudan are yet to ratify the Convention. The CRC does not place children's rights within a hierarchical framework,¹⁴⁹ as all human rights are indivisible as declared by the Vienna Declaration.¹⁵⁰

The CRC is unique because it protects the broadest scope of fundamental human rights ever brought together within one treaty - economic, social, cultural, civil and political.¹⁵¹ It is the first binding international treaty to incorporate civil, political, economic, social and cultural rights into one treaty, placing equal emphasis on all these rights.¹⁵² The CRC was adopted by the UN General Assembly, with the intention of protecting the civil political rights and economic social and cultural rights of all children.¹⁵³ The CRC encompasses the rights expressed in the ICESCR and the ICCPR but that the rights recognised in the CRC are incomparably more expansive.¹⁵⁴

¹⁴⁵ CESCR *General Comment 13*, para 46.

¹⁴⁶ Craven, M., *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development*, (Oxford: Oxford University Press, 1995), p.41.

¹⁴⁷ Van Bueren, note 67 p. 19.

¹⁴⁸ Convention on the Rights of the Child (CRC), G.A. Res 14/25 UNGAOR, 44th Sess., supp No 49 at 167, UNDOC A/44/49 (1989)

¹⁴⁹ *Ibid.* The preamble of the CRC states the rights are equal and inalienable.

¹⁵⁰ Vienna Declaration and Programme of Action, para 5.

¹⁵¹ Jan Martenson, under Secretary General for Human Rights Committee in 1991.

¹⁵² Cohen note 126, p. 18.

¹⁵³ Lopatka, note 132, p. 284.

¹⁵⁴ *Ibid*

Von Struensee opined that the CRC recognises four categories of substantive rights: survival, development, protection, and participation rights.¹⁵⁵ The CRC protects the child's right to education for the development of the child.¹⁵⁶ Right to education is a development right. The participation rights recognised by the CRC proceed on the premise that the child has a right to be heard. To ensure the child's right to be heard, the CRC grants the child the right to freedom of expression and also the right to be heard in matters affecting his/her welfare. It should be noted that all these can only be demanded by the child if she/he has at least basic education, also the child's right to survival such as provision of adequate nutritious food and clean drinking water can only be recognised or learnt through provision and access to basic education. The right to education is pivotal to the enjoyment of all the other rights.

Article 3 introduces the principle of the 'best interests of the child as a primary consideration' in all actions concerning the child. It is noted that this principle is reiterated in numerous articles in the CRC which is a reflection of the standard with which compliance of the 'provisions' requirements of the CRC will be measured.¹⁵⁷ Articles 28 and 29 of the CRC are the main concern in this thesis as they deal with the right to education which includes the right to free and compulsory education. Article 29 of the CRC explicitly expressed the aims of education from the child's perspective.¹⁵⁸ This is further confirmed by the CRC Committee in its General Comment No1 *the Aims of Education*¹⁵⁹ where the Committee notes in respect of Article 29 of the CRC as follows:

[...] The aims of education that it sets out, which have been agreed to by all state parties, promote, support and protect the core value of the value of the Convention: the human dignity innate in every child and his or her equal and inalienable rights....¹⁶⁰

The goal is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence. The Committee states further that Article 29 emphasises the message of child-centered education:- that the key goal of education is the development of the individual child's personality, talents and abilities, in recognition of the fact that every child has a unique characteristic, interest, abilities and

¹⁵⁵ Von Struensee, S.O' Rourke, 'Violence, Exploitation and Children: Highlight of the UN Children's Convention and International Response to Children's Human Rights', 18 *Suffolk Transnat'l L.Rev.* 589 at 594.

¹⁵⁶ Art 28 CRC.

¹⁵⁷ Cohen, note 126, p. 19.

¹⁵⁸ *Ibid*

¹⁵⁹ CRC, *General Comment No1 (2001), The Aims of Education* CRC/GC/2001/1.

¹⁶⁰ *Ibid* para 1

learning needs.¹⁶¹ In essence, education should enable a child to develop his/her characters and also be able to live a fulfilled life within the society.

Article 28 obligates State parties to make primary education compulsory and free to all. In the article, states are required to take measures to encourage regular attendance and ensure reduction of drop-out rates. In order to achieve this, schools must be; free without any indirect costs, with well trained teachers and relevant curriculum, school buildings must be safe and have enough sanitation facilities, classes must not be overcrowded. Article 28 also promotes and encourages international cooperation in matters relating to education, pointing out that particular attention should be taken of the needs of developing nations, because of the realisation of the fact that some developing countries might need financial assistance to fund the running of the free primary education programme. In Article 29 the aims of education are articulated. The article also provides for the liberty of private individuals and organisations to establish private institutions. Chapter three of this thesis analyses in detail the elements of free and compulsory primary education.

The CRC Committee, like the ICESCR Committee, publishes its interpretation of the content of its provisions in the form of General Comments on thematic issues. General Comments carry considerable weight and serve an important function of defining and clarifying interpretation of provisions or other related topics in the instrument in order to assist and promote further the implementation of the Convention. General Comments, though not legally binding, serve as important jurisprudential functions to the meaning of rights and duties under the CRC. It is important to consult the General Comment when assessing the State party's obligation in respect of a particular right because it elaborates the specific right in question. Since 2001, the Committee has issued seven General Comments which cover various topics including the aims of education, adolescent health, early childhood, and HIV/AIDS. "The aim of education" is the first of the General Comments issued by the CRC Committee.¹⁶² It expounds on articles 28 and 29 of the CRC. General Comment 1 will also be dealt with in detail in chapter three of this thesis. It is noteworthy that the CRC made no mention of pre-primary education; it focuses on primary, secondary and tertiary education. With child specific human rights instruments now enacted, the rights of the child are protected and the right to free, compulsory primary education is established.

¹⁶¹ *Ibid* para 9

¹⁶² *Ibid*

2.6.6 The African Regional Child Rights Treaty

Africa is the only region with a region-specific child's right instrument, namely the African Charter on the Rights and Welfare of the Child (ACRWC). It was claimed that the CRC was initiated and drafted by the Western nations. Muyila argued that the CRC is a western phenomenon and that with the exception of Senegal and Algeria, few African countries participated consistently in its drafting process.¹⁶³ Ankut too affirmed this, expressing that; "In the drafting process of the CRC, it was claimed that few African countries participated, as a result issues pertinent to African children are not likely to be articulated in as strong and enforceable terms as deserving of problems of such magnitude."¹⁶⁴ This was also confirmed by Viljoen when he stated that the reasons why an African regional charter was adopted were the sidelining of Africans from the UN drafting process and the exclusion of Africa-specific issues from the CRC.¹⁶⁵ The OAU (now AU) deliberated that a complimentary instrument would be important in order to ensure the implementation of the CRC in African countries in the face of certain local conditions such as: severely depressed economy, widespread occurrence of armed conflict and resultant displacement of populations.¹⁶⁶ The ACRWC in fact deals with certain African specific aspects, such as; prohibition of marriages or betrothals involving children,¹⁶⁷ granting girls the right to return to school after pregnancy,¹⁶⁸ and makes specific reference to care of the child by the extended families,¹⁶⁹ this is very important in the African settings bearing in mind the community set up of the African traditional settings. The ACRWC also makes specific mention of protecting the child against negative social and cultural practices.¹⁷⁰ Its novelty is that it requires the performance of duties not only on the part of both parents/guardian but also duties by the children, demanding that the child has a duty to obey a parent at all times.¹⁷¹ On the duty to obey parent at all times, Van Bueren cautioned, that the responsibility to respect parent and elders at all times is too questioning and general, and where family members are abusing or exploiting children to maintain that children are obliged to respect the abuser is a dangerous

¹⁶³ Muyilla, J.W. *African Values and Problems of Rights of the Child: A Search for Explanations*, (Danish Institute of Human Rights, 2006).

¹⁶⁴ Ankut, P. *The African Child: Linking Principle with Practice*, Open Society Initiative of West Africa (OSIWA) (2006) p.3.

¹⁶⁵ Viljoen, F. 'Why South Africa Should Ratify the ACRWC', (1991) 16: *South Africa Law Journal* , 660 at 661

¹⁶⁶ OAU Report of the Intergovernmental Expert Group Meeting on the Draft African Charter on the Rights and Welfare of the Child 17-21 April 1990 Addis Ababa.

¹⁶⁷ Art 21(2) ACRWC.

¹⁶⁸ Art 11(6) ACRWC.

¹⁶⁹ Art 19 ACRWC.

¹⁷⁰ Art 21 ACRWC.

¹⁷¹ Art 31 ACRWC.

precedent.¹⁷² Viljoen counters this argument expressing that the duty to obey must be counter-balanced against the child's right to freedom of expression,¹⁷³ as well as parents' duty to 'ensure that the best interests of the child as demanded under Article 29 (1)(a) are their basic concern at all times.'¹⁷⁴ Sloth Nelson and Mezmur,¹⁷⁵ both point out that the duty to respect parents, elders and superiors, is akin to positive traditions that the ACRWC identifies as constituting an asset in the upbringing of African children. They elaborate further that it does not entail docility or unquestioning subservience. Associating with Sloth Nelson and Mezmur, it is submitted that the ACRWC will not contain provisions which will contradict the protection of the rights of the child. Therefore, the inclusion of duties for the child in the ACRWC is a step in the right direction.

It might be argued that the ACRWC is a duplication of most of the rights already in the CRC.¹⁷⁶ Although this might be correct, it must be noted that duplication of these rights that are in the CRC and now in the ACRWC is not a problem but a benefit, as it brings additional attention to important issues such as right to education, health and identity. The duplication is to stress the need for state parties to make available additional measures of enforcement for effective implementation of the treaty. The ACRWC is the first regional binding instrument proclaiming the human rights of children. It is a novel human rights document for African children.

Article 11 of the ACRWC provides for the right to education which is the main concern of this thesis. Article 11 (2) states the aims of education, the provisions are similar to article 28 of the CRC. Article 11(3) obligates State parties to provide free and compulsory basic education. The CRC stipulates provision of free and compulsory 'primary' education, whereas the ACRWC stipulates free and compulsory 'basic' education. According to the UNESCO's ISCED, basic education comprises primary education (first stage of basic education) and lower secondary education (second stage). Universal Basic Education (UBE) is regarded as priority for developing countries,¹⁷⁷ and it is also the focus of EFA initiative. In reality, most countries in Africa are not able to provide free primary education for their children, so to extend the free education scheme to cover an additional three years of secondary education is being over ambitious, because it is easier to start with six years of free

¹⁷² Van Bueren, note 67 p.24-25.

¹⁷³ Art7 ACRWC.

¹⁷⁴ Viljoen, note 165, p.664.

¹⁷⁵ Sloth Nelson and B.D Mezmur, 'A Dutiful Child, the Implication of Article 3 of the African Children Charter', 52: (2), *Journal of African Law*, 177.

¹⁷⁶ For example, Right to Education- Art 11(3)(e) ACRWC, Art 28 (1)(e) CRC

¹⁷⁷ S.9 ISCED Level I para 120.

education and gradually move up than to start with nine years of free education which will be difficult to sustain. Thus the focus of this work is on primary education only.

Having enumerated the relevant international and regional human rights instruments has enabled me to lay down the basis of international legal obligations on the right to education, because these instruments bear witness to the importance that State Parties and the international community attach to realising the right to education. ‘International law has a long pedigree of involvement with education.’¹⁷⁸

2.6.7 The Right to Education as Part of Customary International Law:

So long as international human rights treaties do not enjoy universal ratification, treaties will be an incomplete means of attaining the goal of universal recognition for human rights.¹⁷⁹ Customary international law fills this gap, because it binds those states not party to a treaty-provided that the relevant norm has become a rule of customary international law.¹⁸⁰ The Statute of the International Court of Justice instructs the Court to apply ‘international custom as evidence of a general practice accepted as law’ in deciding disputes submitted to it.¹⁸¹ The existence of such a rule has to be proven by demonstrating two elements: that there must be practice generally adhered to by states (*usus*) which states regard as legally binding (*opinio iuris*). Unlike treaties, customary international law binds also those states which never recognised it formally. International courts and tribunals have relied on international declarations and agreements and national constitutions and laws to assist them in determining whether a norm qualifies as customary international law.¹⁸² There has to be widespread evidence of consistent practice by states conforming to a certain norm.

With respect to right to education, the question may be asked whether, in view of the many national and international documents which deal with educational issues, the right to education may be considered to have become part of customary international law. Knight, who is a proponent of the proposition, refers to the fact that the right to education is protected at the international level under UDHR, ICESCR and CRC, and that the right to education is also protected at the regional level under ACHPR and ACRWC, this qualifies it as a customary norm of international law.¹⁸³ He notes that a norm attains that status if it is a

¹⁷⁸ Van Bueren note 67 p256.

¹⁷⁹ Viljoen, F., *International Human Rights Law in Africa* (2nd edition), (Oxford: Oxford University Press 2012), p.29.

¹⁸⁰ *Ibid*

¹⁸¹ Article 38(1)(b) Statute of the International Court of Justice.

¹⁸² In the *Western Sahara* Advisory Opinion (1975) ICJ Reports 12.

¹⁸³ Knight, S. ‘Proposition 187 and International Human rights Law: Illegal discrimination in the right to education’ In: *Hastings International and Comparative Law Review*, Vol. 19, No. 1, 1995, p188.

‘general practice accepted as law’.¹⁸⁴ With respect to the UDHR, it has been stated that most of its provisions, in themselves, have acquired the force of customary law.¹⁸⁵ Louis Sohn is of the opinion that ‘the Declaration, as an authoritative listing of human rights has become a basic component of international customary law binding on all states, not only on members of the United Nation.’¹⁸⁶ According to this view, article 26 of the UDHR on the right to education would therefore be binding as customary law. It can be asserted, however, that two educational principles have become part of customary international law, namely the right to free and compulsory primary education and the right not to be discriminated against in the enjoyment of educational rights.¹⁸⁷ The right to free and compulsory primary education is protected in many international instruments. The language of the various provisions in the instruments is remarkably uniform. The tone is obligatory. Most texts use the word ‘shall’ to express the nature of the state’s duty. Beiter is of the opinion that a state which has not ratified the ICESCR which guarantees the right to free and compulsory primary education in Article 13(2) (a) and the right not to be discriminated against in the enjoyment of educational rights in article 13 read with article 2(2), will nevertheless, be obligated to realise these rights as the state’s obligations flow from customary international law.¹⁸⁸ Also many national constitutions and laws protect the right to free and compulsory primary education. On the basis of such consideration, it has quite correctly been claimed that the denial of a free primary education to children is thus a clear violation of this customary right under international law.¹⁸⁹

2.7 Domestication of the children’s rights in Nigeria

Ratification is an important first step. International human rights are not worth the paper it is written on, unless it is absorbed and made part of national law and policy.¹⁹⁰ The effect of a human rights treaty will be greatly reduced if it is not domesticated into the laws of the State Parties.

The purpose of imposing international obligations on state parties to international and regional human rights instruments is to ensure that the rights and freedoms guaranteed under

¹⁸⁴ ICJ Statute, art 38(1)(b).

¹⁸⁵ Van Bueren note 67, p. 256.

¹⁸⁶ Sohn, L. quoted by Knight note 183, on p. 188.

¹⁸⁷ Hodgson, D., *The Human Right to Education*, Aldershot/ Brookfield USA: Ashgate / Dartmouth, 1998 (Programme on International Rights of the Child ; series editor: G. Van Bueren). Pp63-64.

¹⁸⁸ Beiter, K.D *The Protection of the Right to Education by International Law*, (Leiden: Martinus Nijhoff, 2005), p.46.

¹⁸⁹ Knight, note 183 at p. 197.

¹⁹⁰ Koh, Harold Hongju ‘How is International Human Rights Law Enforced?’ (Fall 1999) 74 *Indiana Law Journal* 1397.

the instrument are translated into practical reality for those whom the said rights and freedoms are designed to protect. Rights and freedoms themselves are of little value if they are not translated into practical reality.¹⁹¹ This is effected through application of the instrument as part of the domestic law either by way of incorporation or transformation. The municipal law of each country states the required mode of incorporation of the treaty, and where this is not expressly stated it could be inferred from the type of legal system in operation in the country. Usually, common law countries adopt dualism while civil law countries are monist. Under Dualism, domestic law-making (enabling legislation) is required to incorporate international law into national law in order to domesticate it. This can be done either by amendment of existing laws or adoption of new domestic legislation in line with the treaty. A close scrutiny of the Nigerian Constitution reveals that Nigeria has adopted a dualist approach.¹⁹² Under international human rights law, state parties are normally obliged to: ‘Undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the relevant convention’.¹⁹³ States are required to ensure that the national laws meet with the standards of the treaty.

Under the Nigerian Constitution, the executive arm of the government enters into international treaty agreements. For the treaty to be enforceable it must be enacted by the federal legislative arms; the Senate and the House of Representatives. These two ‘houses’, are empowered under the constitution to enact laws for the purpose of implementing treaties.¹⁹⁴ In the case of a treaty on matters¹⁹⁵ not on the exclusive legislative list, such a treaty shall not be presented to the President for assent and shall not be enacted unless it is ratified by majority of all the state legislative houses of assembly in the federation.¹⁹⁶ Once treaties acquire a national status after passing the necessary procedures, it is important to determine the status of treaties *vis a vis* other domestic laws. If treaties are not given a higher hierarchy or given a lower position against other domestic laws, this will affect their effective implementation especially if they conflict with the national law. The Constitution of Nigeria states unequivocally that ‘The constitution is supreme to all other laws.’¹⁹⁷ This includes human rights treaties. In Nigeria the status of treaties *vis a vis* municipal laws was clarified

¹⁹¹ Carlson, A. ‘Obligations of State Parties to the African Charter on Human and Peoples’ Rights,’ (1998) *African Journal of International and Comparative Law*, p.10

¹⁹² S.12 1999 Constitution of Nigeria

¹⁹³ Art 4 CRC & Art 1 ACRWC

¹⁹⁴ S.12, 1999 Constitution of Nigeria.

¹⁹⁵ S. 12 (2) ,1999 Constitution of the Federal Republic of Nigeria

¹⁹⁶ S. 12 (2) ,1999 Constitution of the Federal Republic of Nigeria

¹⁹⁷ S.1 1999 Constitution of Nigeria

by the Supreme Court in the case of *Abacha v. Fawehinmi* in 2000.¹⁹⁸ The court held that; a treaty when enacted into law by the National Assembly is a statute with ‘international flavour’. Being so if there is a conflict between it and another domestic legislation its provision will prevail.¹⁹⁹ The reason is because the legislature does not intend to breach an international obligation.²⁰⁰ The domestic application of ACHPR into Nigerian legislation is discussed in chapter five of the thesis.

To fulfil Nigeria’s obligation under the CRC and ACRWC to domesticate these treaties, the state enacted the Child’s Rights Act (CRA) 2003. The CRA is to a great extent inspired by them.²⁰¹ The CRA is the national law that protects the rights of the child in Nigeria which will be discussed fully in chapter five of the thesis. Nigeria being a state party to the various international human rights instruments should fulfil its obligations, both legal and political in regard to providing free primary education for all children and in addition, monitor the implementation of this right effectively.

2.8 Conclusion

Although the concept of children’s rights has grown in importance and received international attention, unfortunately they are not universally protected effectively. For example in Africa, the participation rights in the CRC and the ACRWC are seen to be most radical and unacceptable as they are a challenge to the African culture.²⁰² Harmful cultural and religious practices perpetrated on children in Africa remains a significant impediment to the realisation of the aims in the children rights instruments such as the CRC and the ACRWC. For example, a young girl ranks lowest on the ladder, if she is from Africa; her situation is even made worse as a result of cultural beliefs and traditional practices. She is the first to drop out of school; she is married off young to a man old enough to be her father and already has other wives. The African child has to contend with various problems such as poverty, inadequate medical facilities, war and forceful conscription into the military by rebel groups. It is apparent that ensuring the rights, welfare and dignity of children in Africa is a monumental challenge. Children in Sub-Saharan Africa face the gravest challenges for survival.

¹⁹⁸ *Abacha v. Fawehinmi* (2000) 4 SCNJ 400.

¹⁹⁹ *Ibid* at 446.

²⁰⁰ *Ibid*

²⁰¹ Edegbe, E., ‘Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria’, (2007) 51 JAL 268-272.

²⁰² Falola, note 47.

In this age of advanced technology, sadly Africa is lagging behind as a result of its high illiteracy rate. A lot of children remain in poverty and are uneducated, because it is unaffordable to the majority of children. Education will help ensure a safe, healthier life, contribute to the socio economic and cultural progress. More than two-thirds of children not in school live in Sub-Saharan Africa and South East Asia²⁰³ because education is not free and is unaffordable to children from poor households who are the majority of this group. The failure of a State to comply with the provision of free and compulsory primary education as a human right laid down in international agreements amounts to a violation of international law by the State. Therefore access for all children to free, compulsory and quality education must be assured by every State party to the relevant human rights instruments. In the quest to achieve education for all, treaty law is clear that; - states must make free and compulsory primary education a fundamental right.

The next chapter discusses the principles of education. It examines right to education from human- rights based approach, expounding the legal obligation of states stemming from the right to education as structured according to the 4As scheme (making education available, accessible, acceptable and adaptable).

²⁰³ Global Conference on Girls Education held in Dakar Senegal on 17th May 2010.

Chapter Three

The Fundamental Principles of the Right to Education

3.1 Introduction

Having discussed the general rights of children in relation to their specific right to education in Chapter 2, this chapter focuses on the conceptual analysis of the fundamental principles of the right to education, with emphasis on the right to free compulsory primary education. Pursuant to international human rights principles, this thesis continues to use the human rights-based approach to interrogate the state's obligations to fulfil and protect this right.

As highlighted in the last chapter, the right to education is addressed in most international human rights instruments,¹ which affirm that the aim of education is to promote the full development of human personality, strengthen respect for human rights and freedom, and promote understanding, friendship and tolerance among nations, racial and religious groups.² The right to education is often referred to as a 'multiplier right' because its enjoyment enhances other rights. For example, the enjoyment of a number of civil and political rights such as freedom of information, and the right to vote depend on a minimum level of education and literacy.

The right to education relates to both quantity and quality, encompassing access to educational provision, as well as the elimination of discrimination at all levels of the educational system and continuous quality evaluation and improvement. The rights-based approach to education describes the situation in terms of the states' obligations to respond to the right of the child to education. This approach is most essential for realizing the right to education in developing countries, as it identifies the state as the duty bearer and the children as the right holders. The states therefore are held accountable for the implementation of the right and children are entitled to claim the right to free primary education. Unlike the 'needs-

¹ Article 26, Universal Declaration of Human Rights,(UDHR) 1948, G.A.Res 217, UNGAOR 3rd Sess.Supp. No127 at 71 UN Doc A/80 (1948), International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), 993UNTS 3 entered into force January 3 1976, Article 13; Convention on the Rights of the Child (CRC) (1989) G.A.Res44/25 UNGAOR, 44th sess, Supp No49 at 167, UN Doc/44/49 (1989), entered into force 2nd September 1990 Article 28; African Charter on the Rights and Welfare of the Child (ACRWC) (1990), OAU/Doc/CAB/LEG/24.9/49(1990) entered into force Nov 29 1999, Article 11; and UNESCO Convention against Discrimination in Education (1960) entered into force 22nd May 1962,Article 4(a).

² Article 26, UDHR; Article 13(1) ICESCR; Article 29 of the CRC.

based approach', which is often met out of charitable intentions, the rights based approach is based on legal obligations that the state must fulfil.³ Particularly, primary education deals with the fundamental basis of a child's development and the development of society as a whole.⁴ While the Nigerian Child's Rights Act 2003 obligates that primary schooling should be free and compulsory, this is not practically the case because pupils still have to pay for various levies and stationery which directly excludes many children from school, and this cannot be judicially challenged due to constitutional constraints as will be analysed later in chapter 5.

The chapter is divided into three main parts: The first part evaluates the constituent components in the implementation of the right to education. These are grouped into three sections namely; the principles of human rights-based approach to education, the core contents and obligations of the right to education, and the aims and objectives of education. The second part discusses the key features of the right to education in international law, which are structured according to the 4As scheme, (Availability, Accessibility, Acceptability and Adaptability). It identifies and addresses the importance of these four essential features of education. The 4As scheme is the criteria that will be used in this thesis for evaluating the indicators for free primary education in Nigeria. This will reflect on and evaluate the level of realisation and enjoyment of the right to free primary education in the country. The third part analyses the global commitments and target goals to ensure access to primary education for children globally. It is also argued that the dominant global approach to education has shifted focus from education as a human rights wherein primary education is free and compulsory, to education being a traded service, because the latter is the language approved by the international loan givers such as the World Bank and IMF which contradicts States' obligations under the right to education. The resultant effect is that a lot of children in developing countries are excluded from schools because the notion of education as a right has been compromised. It is submitted that international cooperation is essential for facilitating the move towards a right-based education especially in countries whose governments are not able to guarantee fully free primary education for its children due to resource constraints.

³ Cornwall A. & Nyamu-Musebi, C., 'Putting the 'Rights-based Approach' to Development into Perspective' (2004) 25 *Third World Quarterly* 1415-1437 at 1415-16.

⁴ Coomans Fons, 'In Search of the core content of the Right to Education', in: A.Chapman & S.Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, (Antwerp: Intersentia 2002) pp.217-246 at 231.

The right to education mainly includes, as a necessary condition, three major actors: the state, which is the provider or funding body of public schools; the child, who is the bearer of the right to education and also under a duty to attend school where it is compulsory; the parents who have a duty not to prevent the child from attending primary school if it is free. The law cannot force the parents to ensure education for their children if it is beyond their means as many parents in poor countries are not able to afford the fees. The parents also have the freedom to choose their children's education; this is aimed at preventing state's monopoly of education.⁵ Article 18 CRC establishes that parents have the responsibility for the upbringing and development of the child.

3.2 Constituent Components in the Implementation of the Right to Education

Three essential components must be identified in the implementation of the right to education, these are; first, the programming must be a human rights based approach. Secondly, the core content which is the crucial element without which a right loses its fundamental importance as a human right must be met. Thirdly, in implementing the right to education it must fulfil the aims and objectives stipulated in the relevant international human rights laws.⁶ It is therefore clear that right to free and compulsory primary education should definitely be seen as a legal right with corresponding obligations for duty bearers, which requires compliance of the rights to be assessed and monitored with appropriate indicators and of which the violations are measured against internationally accepted standards. These are discussed fully below in the chapter.

3.2.1 Human Rights-Based Approach for the Right to Education

A rights-based approach (RBA), also referred to as human rights based approach or human rights approach, has attracted enormous attention from the UN agencies, international civil society organizations (CSOs) and donors since the end of the 1990s.⁷ A rights-based approach to development is a framework that integrates the norms, principles, standards and goals of the international human rights system into the plans and processes of development. It is central to the premise of RBA that human beings have inalienable rights and a deprivation can often be addressed as a denial of rights. One of the most fundamental dynamics of a

⁵ There is universal guarantee of parental choice; Art 26(3) UDHR, Art 5(1) (b) UNESCO Convention against Discrimination in Education, Art 13(3) ICESCR, Art 18(4) ICCPR, Art 29(2) CRC and Art 11(7) ACRWC.

⁶ Art 26 (2) UDHR, Art 13 (1) ICESCR and Art 29 CRC.

⁷ Dan Banik, *Implementing Human Rights-Based Development: Some Preliminary Evidence from Malawi, Expert Seminar: Extreme Poverty and Human Rights*, 2007, 1, available at http://www2.ohchr.org/english/issues/poverty/expert/docs/Dan_Banik.pdf [accessed 13 July 2014].

human rights, and consequently of a rights-based approach, is that every human being is a rights-holder and that every human right has a corresponding duty-bearer. A rights-holder; is entitled to rights, is entitled to claim rights and is entitled to hold the duty-bearer accountable. Consequently, the states are duty-bearers and have the obligation to respect, protect, and fulfil the rights of the rights-holder. The overall responsibility for meeting human rights obligations rests with the state. This responsibility includes all the organs of the state such as executives, legislators, ministries, local authorities, judges and justice authorities, police, or teachers. All these are legal duty-bearers. The state as a legal duty-bearer also has a duty to regulate the actions of moral duty-bearers – e.g. parents, and guardians in the case of children, to ensure that they respect human rights. Right-based approaches seek to hold governments and other duty-bearers accountable and encourage rights holder to claim their rights.

RBA has the following three pillars;⁸ first, all policies and programs should have the ultimate goal of advancing the protection and fulfilment of human rights as envisaged in the UDHR and other human rights documents. RBA strongly demands that policies and programs must advance human rights. Second, human rights standards laid down or derived from various human rights documents should direct the design, implementation and evaluation of all programs and policies of all sectors. This requirement seeks to test the systematic integration of human rights principles, universality, equality, accountability and rule of law, in all phases of the programming and policy process. Third, under human rights law, while individuals or groups of individuals are rights-holders, states and other non-state actors are the duty bearers. Thus, the national programs and policies must contribute towards building the capacities of states and non-state actors to discharge their obligation, and of individuals or groups of individuals to claim their rights.

These principles are expounded into four concrete focus areas, which offer clear direction to RBA programming. These are; first, *inalienability, indivisibility and interdependence of human rights*, second, *empowerment and participation*, third, *equality and non-discrimination*, and last, *Accountability*. The application of these human rights principles to the development process forms the fundamental basis of an RBA.

⁸ Boesen Jakob Kirkemann and Martin Tomas, *Applying a rights-based approach: An inspirational guide for civil society*, (Copenhagen:Danish Institute for Human Rights 2007) p.4.

Inalienability, Indivisibility and Interdependence of Human Rights

As reiterated in the Vienna Declaration, '[a]ll human rights are universal, indivisible and interdependent and interrelated'.⁹ This principle entails two things. First, all human rights must be given the same attention. There is no hierarchical order whatsoever between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. Second, the interdependence and interrelatedness of rights entails that the protection and fulfilment of one right often depends on the protection and fulfilment of other rights. This in turn, calls for collaboration among different sectors for fruitful implementation of national programs, strategies and policies. Interdependence and indivisibility of human rights require engaging a wide range of stakeholders to promote collaboration among sectors and levels of government, and external partners. Speaking in respect of the right to education, Tomasevski endorsed the principle by stating that the right to education embodies elements of economic, social and cultural rights as well as civil and political rights.¹⁰

Empowerment and Participation

Under a RBA, individuals are not simply recipients of goods and services. All persons are entitled and expected to engage meaningfully in society at the community and state level. They have the right to actively, freely and meaningfully be involved in all matters affecting their lives. To that end, government institutions must be transparent and ensure access of individuals to information. Coomans points out that the right to education is an empowering right as it increases the individual's means to control his or her life and the ability to claim rights against the states.¹¹ As regards children, child's participation is an essential guiding principle of both the CRC¹² and ACRWC.¹³ Children's participation is about listening to them, taking them seriously and understanding children's issues through their point of view. However, it does not entail that children's opinions should be automatically endorsed. It requires a process of dialogue in which children are given the opportunity to influence decisions. In such a process, adults should provide direction and

⁹ Vienna Declaration and Program of Action adopted by the World Conference on Human Rights on 25th June 1993, UN doc.A/CONF.157/23, para. 5.

¹⁰ Tomasevski, Katarina *Annual Report of the Special Rapporteur on the right to education- Katarina Tomaevski*, 11 January 2001, E/CN.4/2001/52, (Annual Report 2001), p.3. See also; Katarina Tomaevski, 'Has the Right to Education a Future within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004', (2005) 5 *Hum. Rts. L. Rev.* 205.

¹¹ Coomans, Fons, 'In Search of the Core Content of the Right to Education', in: S. Chapman & S. Russell (eds), *Introduction to Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, (Antwerpen: Intersentia 2002), 217-246, p.231.

¹² Articles 12 and 13 of the CRC

¹³ Articles 4 and 7 of the ACRWC

guidance to children while considering the child's views in a manner consistent with the child's age and maturity. In genuine child's participation the process must be free from pressure and manipulation. In addition, it should be ensured that the most disadvantaged and marginalised children have opportunities to participate and make their voices heard. Education is an important empowering tool for children.

Equality and Non-Discrimination

International human rights law strongly condemns discrimination on unjustifiable grounds. The various human rights instruments guarantee the right of individuals to be free from discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁴ The term —other status‖ in the human rights instruments shows that the grounds of discrimination are not exhaustive. Other grounds, not explicitly stated, such as age, and disability, are also prohibited. Thus, States should refrain from putting in place laws, policies and programs that directly or indirectly exclude people. Under a RBA, 'the ground is level', no one is singled out for special favour, no distinction based on colour and no one is identified as being superior or inferior. All are equal. Rights-based education is non-discriminatory; it includes all children regardless of geography, ethnicity, economic status or disability. Non- discrimination in respect to right to education is discussed in detail later in the chapter.

Accountability

States are the primary duty-bearers for the protection and promotion of human rights. Under a RBA approach, States should be accountable in the event of their failure to live up to their human rights obligations. Human rights law has devised a framework within which individuals can seek remedies where their rights are infringed before appropriate judicial or quasi-judicial organs according to the rules and procedures determined by law. Apart from legal redress, accountability requires effective monitoring system and transparency of actions. In the context of right to free and compulsory primary education, transparency entails a host of obligations on States, such as ensuring the availability of information pertinent to the implementation of free primary education. The budgetary allocation and disbursement or funds for free primary education programme education should be available to all. Ferguson argues that to talk in terms of rights is in itself a - 'vehicle' for increasing the accountability

¹⁴ UDHR Article 2, ICESCR Article 2(2); ACRWC in Article 3; UNESCO Convention against Discrimination in Education, 1960, Article 1(1).

of government organisations to their citizens and consequently increasing the likelihood that policy measures will be implemented in practice'.¹⁵ While the State is the principal duty-bearer with respect to the human rights of the people living within its jurisdiction, the international community also has a responsibility to help realize universal human rights. Thus, monitoring and accountability procedures must not only extend to States, but also to global actors-such as the donor community, intergovernmental organizations, and international NGOs, all whose actions bear upon the enjoyment of human rights in any country.¹⁶ Uvin argues, 'the very move from charity to claims brings about a focus on mechanisms of accountability'.¹⁷

While the fundamental human needs are the basis of human rights there are some notable differences between needs and rights. Human rights go beyond the notion of physical needs and include a more holistic perspective of human beings in terms of their civil, political, social, economic, and cultural roles. Rights always trigger obligations and responsibilities, whereas needs do not. Rights cannot be addressed without raising the question of who has obligations in relation to these rights. This automatically raises questions about the actions and accountability of duty bearers. People are often expected to be grateful when their needs are met; this is not the case when people's rights are met. It is therefore wrong to be campaigning for 'the needy children', but rather advocate support for these group of children as equal human beings in their efforts to claim their rights and address the poverty, suffering and injustice in their lives particularly in respect of their education. The shift in development thinking introduced by RBA is well illustrated when compared to traditional charity- or needs-based approaches to development. A rights-based approach, for example, is likely to give priority to severe or gross types of rights violations even if these affect only a small number of children, while needs-based approaches would offer a basis for justifying a focus on less severe types of violations that affect a larger number of children.¹⁸ In applying rights-based-education, there should be focus on legal and institutional frameworks and promotion of the rule of law. The justice mechanism for seeking redress in case of violation must also be in conformity with human rights principle and standards.

¹⁵ Ferguson, C. *Global Social Policy Principles: Human Rights and Social Justice*, (London: DFID, 1999), p23.

¹⁶ UNOHCHR, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, available at www.unhchr.ch/development/povertyfinal.html, 2002, paragraphs 23 & 230. 15

¹⁷ Uvin, P. *Human Rights and Development*, (Bloomfield: Kumarian, 2004), p131.

¹⁸ UNICEF, *A Human Rights –Based Approach to Education for All: A framework for the realisation of children's rights to education and rights within education*, (Paris: UNICEF 2007) p.10

To sum up, the core human rights principles that should direct and be integrated in free primary education programs, strategic plans, policies and laws are: the interdependence and indivisibility of rights, participation, non-discrimination, accountability. Non-discrimination enjoins States not to put in place laws, policies and programs that directly or indirectly exclude people. The principle of accountability under a RBA requires States to be responsible for violations of human rights, to have effective remedies for victims of human rights violations and to put in place effective monitoring and enforcement mechanisms. If claims exist, methods for holding those who violate claims accountable must exist as well. If not, the claims lose meaning. Having described the significance of RBA to education programming, it is imperative to discuss the core content of the right to education.

3.2.2 The Core Content of Right to Education

Generally the ICESCR Committee has outlined a minimum level for each right which is the duty of State Parties as per General Comment 3 on Article 2(1) of the ICESCR.¹⁹ The core content of a human right refers to the entitlements which make up the right. It is that essential element without which a right loses its substantial significance as a human right. Alston has argued in favour of the use of the term ‘core content’, proposing that each right must give rise to an absolute minimum entitlement.²⁰ The minimum core content is a minimum acceptable standard from below which indicates a violation. Minimum core content is not a fixed ceiling; the standard rises as the country’s condition improves, but does not go lower. It has been criticised that the minimum core directs attention only to the performance of developing states.²¹

Specifically, the ICESCR Committee has expounded the minimum core obligation with respect to the right to education to include four main obligations;

...to ensure the right access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in Article 13(1); to provide primary education for all in accordance with Article 13(2) (a); and to ensure

¹⁹ CESCR *General Comment No3 The Nature of States Obligation (Article 2 para 1 on the Covenant)*, (1990), UN Doc E/1991/23.

²⁰ Alston, P., ‘Out of the Abyss: ‘The Challenges, Confronting the New UN Committee on Economic, Social and Cultural Rights’, (1987) 9 *Human Rights Quarterly*, 332-381 at 353. See also The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), UN DocE/CN.4/1987/17, Principle no 56..

²¹ Craven, M. *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, (Oxford: Oxford University Press, 1995), p 34.

free choice of education by parents without interference from the State provided the institution conforms with minimum educational standards'.²²

Other elements which may be inferred from these provisions are that primary education shall be free and compulsory to all, there should be respect for parents' freedom to choose schools for their children, the liberty of individuals and bodies to establish educational institutions must be respected. Another obligation states that the States must adopt a detailed plan of action for progressive realisation of securing free primary education in their jurisdiction within two years of becoming a state party to the ICESCR.²³ After the two years, minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.²⁴ In all cases, however, full realization of the rights depends on the availability of adequate financial and material resources. Nonetheless, as established by the Limburg Principles 2528,²⁵ and confirmed by the developing jurisprudence of the ICESCR Committee, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights including the right to education.²⁶ Documentation and monitoring violations of the minimum core obligations of the state should be carried out by the relevant actors, NGOs and international organisations. The obligation to ensure minimum content of the right to education of the child is an obligation of immediate nature.²⁷ The requirement to take measure within a reasonable time thus applies to measures that go beyond the minimum core content of the right to education.²⁸

3.2.3 Aims of Education

The human rights legal framework contains a number of principles with regards to the aims and objectives of education, which are set out in the various international human rights instruments. For example, Article 26(2) of the UDHR provides that:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups and shall further the activities of the United Nations for the maintenance of peace.

²² CESCR, *General Comment No 13 The Right to Education*, E/C.12/1999/10 para57. See also Articles 13(3) and (4).

²³ Article 14 ICESCR, State is obliged to work out and adopt a detailed plan of action within two years. A state cannot escape the obligation to adopt a plan of action.

²⁴ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (1998) 20 *Human Rights Quarterly* pp.691-704, para 9.

²⁵ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), UN Doc E/CN.4/1987/17, Principle no 56.

²⁶ Maastricht Guidelines, note24, para10.

²⁷ Coomans, note 11, p.200.

²⁸ *Ibid*

The first three objectives, omitting the UN's promotion, have since been incorporated in binding form in Article 13(1) of the ICESCR.²⁹ Article 29 of the CRC also explicitly expressed the aims of education from the child's perspective.³⁰ This is further confirmed by the CRC Committee in its General Comment No 1 on the Aims of Education³¹ where the Committee notes in respect of Article 29 of the CRC as follows:

The aims of education that it sets out, which have been agreed to by all state parties, promote, support and protect the core value of the value of the Convention: the human dignity innate in every child and his or her equal and inalienable [...] The goal is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence. [...] [T]he curriculum must be of direct relevance to the child's social, cultural, environmental and economic context and to his or her present and future needs and take full account of the child's evolving capacities, teaching methods should be tailored to the different needs for different children.³²

The ICESCR Committee, in its General Comment No.13,³³ has also expounded this provision by referring to the aims and objectives of education stated in other human rights documents and declarations, stating that the Committee takes the view that States parties are required to ensure that education conforms to the aims and objectives identified in Article 13(1), as interpreted in the light of Article 1, World Declaration on Education for All (Jomtien, Thailand, 1990); Article 29(1), of the CRC, the Vienna Declaration and Programme of Action (Part I, para. 33 & Part II, para. 80) and the Plan of Action for the United Nations Decade for Human Rights Education (para. 2). The Committee noted that while all these texts closely correspond to Article 13(1) of the ICESCR, they also include elements which are not expressly provided for in Article 13(1), such as specific reference to gender equality. These new elements the Committee described as implicit in and reflecting a contemporary interpretation of Article 13(1). The Committee notes further that these objectives reflect the fundamental purposes and principles of the UN as enshrined in Articles 1 and 2 of the UN Charter. These are also found in Article 26(2) of the UDHR. Education goes beyond the achievement of literacy and numeracy but must enable individuals to develop 'the personalities, talents and abilities and to live a full and satisfying life within society'.³⁴

²⁹ Van Bueren, G, *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff Publishers, 1994), p.254.

³⁰ *Ibid*

³¹ CRC General Comment 1 The Aims of Education Article 29(1), CRC/GC/2001/1, 17 April 2001.

³² *Ibid*, para12.

³³ CESCR General Comment No.13, para 5.

³⁴ CRC General Comment 1, para 2.

Relatedly, article 18 of the ICCPR requires states ‘to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their convictions’. Therefore, education shall also be in conformity with the parents’ religion. The ACRWC³⁵ also regarded education as a tool for heightening awareness of ‘African morals, traditional values and cultures’ and for the ‘promotion and achievements of African Unity and Solidarity’.³⁶ The ACRWC reiterates the principles contained in other international human rights instruments and adds the preservation of African morals, values and cultures, as well as national independence; the promotion of African unity and solidarity; and the promotion of the child understanding of healthcare.³⁷ This provision is aimed at preserving African values and cultural identity, so the curriculum must portray positive African cultures. It recognizes the importance of imparting respect for human rights as well as for children’s identity, language and values, and for the national values of the country in which children are living. This is also reflected in Article 29(1)(c) of the CRC. Education must ensure that essential life skills are learned by every child and that no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life,³⁸ and should prepare children for a responsible life.³⁹

Van Bueren has remarked at the surprising detail of the aims of education in international law. She suspected States feel they can incorporate ambitious educational aims because they will not be held accountable for their non-fulfillment. She suggested that the CRC Committee ought to ask State Parties to provide detail on how they have implemented the aims at each level of education as guaranteed under the CRC.⁴⁰

3.3 The Key Features of the Right to Education

The former UN Special Rapporteur on the Right to Education devised a scheme⁴¹ which embraces all the required contents for education, corresponding States’ obligations and the entitlements of the right holders. This scheme; the ‘4-A’ - scheme,⁴² was also adopted by the ICESCR Committee;⁴³ and distinguishes between four interrelated and essential features of

³⁵ OAU Doc. CAB/LEG/24.9/49 (1990) entered into force 29 November 1999.

³⁶ Art. 11(2) (c) and (f) ACRWC

³⁷ Article 11(2) ACRWC

³⁸ CRC General Comment 1, para 9.

³⁹ Art. 29(1) (d) CRC

⁴⁰ Van Bueren, note 29, p.254.

⁴¹ This scheme has been used for the first time by the then UN Special Rapporteur on the right to education, Tomasevski in her preliminary report, see UN Doc E/CN.41/1999/49, chapter II.

⁴² The Right-to-Education <http://r2e.gn.apc.org/node/1063>.

⁴³ CESCR, General Comments no13, para 6, see also; Article 13(2)(e) ICESCR.

education which are availability, accessibility, acceptability and adaptability. These are very essential features of the right to education highlighted in this thesis and will serve as the benchmark against which primary education in Nigeria will be analysed. Using the '4-A'-scheme would be a helpful tool for the interpretation of the right to education. It is meant to be a model strategy for action which would lead all children in Nigeria to be able to attain free primary education. The four components are elaborated below.

3.3.1 Availability

Availability relates broadly to the availability of an adequate number of functioning educational institutions, programmes and infrastructure for the right to be fulfilled.⁴⁴ Availability also refers to the provision of facilities such as sanitation and clean water, as well as enough classrooms. The public educational system should allow parents to choose in accordance with their religious and moral convictions schools for their children or wards.

The indicators for availability elements are broadly, safe school buildings, sufficient numbers of qualified teachers, and availability of schools in rural areas. The indicators would also include sufficiency of school infrastructure, sufficient blackboards, tables, desks, chairs and space per class, adequate sanitation facilities, available clean drinking water, well ventilated classrooms, canteens, and recreational facilities. In quintessence, states have obligations to establish the legislative and policy framework, together with sufficient resources to fulfil the right to free primary education for every child, by providing each child with an available school place or learning opportunity, together with appropriately qualified teachers and adequate and appropriate resources and equipment. Without doubt, ensuring that primary schools are available for all children requires a considerable investment, where public funding is insufficient, poor states need to seek international assistance from richer states, international financial institutions such as the World Bank, regional banks, and international organisations.⁴⁵ An avenue for education must be available to every child. This links to the element of accessibility.

3.3.2 Accessibility

Accessibility refers to education being a possibility to all children and it is a very crucial element of the right to education. The availability of education does not necessarily make it accessible to all. Accessibility has three overlapping dimensions: non-discrimination,

⁴⁴ *Ibid*, para 6(a).

⁴⁵ *Ibid* paras 56 & 60

physical accessibility and economic accessibility. Education must be accessible to previously excluded and unreached children.⁴⁶ In addition, education provided by the state should be of the same quality for all groups in society; girls and boys should be given the same quality of education. Physical accessibility refers to education being within safe physical reach for children, and economic accessibility refers to the affordability of education.⁴⁷

Non Discrimination in education:

The fundamental principles established in the UNESCO Convention against Discrimination in Education is aimed at ensuring that education becomes truly inclusive by effectively reaching the unreached especially the poor, marginalised and the vulnerable groups, children, young people and rural population denied of equal access to education.⁴⁸ Discrimination in education is a violation of rights and is proscribed by the UNESCO. The Dakar Framework for Action also emphasises the elimination of all forms of discrimination and prioritises the excluded, vulnerable and marginalised children.⁴⁹ The principles of equality and non-discrimination are embedded throughout the human rights framework and prescribe that all rights must be ‘exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.⁵⁰

The prohibition against discrimination enshrined in Article 2(2) of the ICESCR is subject to neither progressive realisation nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.⁵¹ In some circumstances, separate educational systems or institutions for groups, defined by the categories in Article 2(2), are not deemed to constitute a breach of the Covenant.⁵² According to the Article, separate institutions can be made for different sexes, religious or linguist groups without their focus on particular groups being considered discrimination.⁵³ The bypass of what could be considered discrimination results from the principle enshrined in Article 2 of the UDHR and reproduced in the UNESCO Convention itself,⁵⁴ by which parents are free to choose their children’s institutions other than

⁴⁶ Article 2(2) and 3 ICESCR, Article 26 ICCPR, Article 2 CRC, and Limburg Principles at 35 and 37.

⁴⁷ CESCR *General Comment no 13*, para 6.

⁴⁸ Article 1 UNESCO Convention against Discrimination in Education 1960.

⁴⁹ Dakar Framework for Action, Education for All: Meeting our Collective Commitments. Adopted by World Education Forum. Dakar, Senegal 26-28 April 2000.

⁵⁰ UDHR Article 2, ICESCR Article 2(2); ACRWC in Article 3; UNESCO Convention against Discrimination in Education, 1960, Article 1(1).

⁵¹ Article 2(2) and 3 ICESCR, Article 26 ICCPR, Article 2 CRC and Limburg Principles at 35 and 37.

⁵² CESCR, *General Comment no 13*, para 33.

⁵³ Article 2(2) and 3 ICESCR, Article 26 ICCPR, Article 2 CRC and Limburg Principles at 35 and 37.

⁵⁴ Article 2(b) UNESCO Convention against Discrimination in Education 1960

those maintained by public authorities. However, such institutions must conform to minimum laid down standards and must not be aimed at securing exclusion of a group.⁵⁵ The principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals and irrespective of legal status.⁵⁶ All such discrimination are in direct contradiction with the requirements in Article 29(1)(a) of the CRC, that education be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential.⁵⁷

The principle of non-discrimination in education is an immediate obligation, and it plays a key role in empowering marginalised groups such as women and girls, and helps to combat wider discrimination within societies. Non-discrimination applies to all aspects of education including access to education, the content of education, teaching methods, the outcomes of learning, education staffing, as well as laws, policies and administrative practices. States have a minimum core obligation to ensure that resources are allocated in a non-discriminatory manner. Therefore as States develop and expand educational programmes, particular segments of the population should not be passed over and States must not direct marginalised groups to an inferior standard of education.

Van Bueren has noted that the right to education on the basis of equal opportunity is so fundamental to the child's right to education that the drafters of the CRC made all other aspects of the right to education dependent upon it.⁵⁸ Article 28(1) places a duty on State Parties to recognise the right of the child to education with a view to achieving the right progressively 'on the basis of equal opportunity'. Verheyde has also pointed out that the principle of equality implies that special attention should be given to specific groups which are particularly vulnerable to discrimination in education and which consequently require special policies.⁵⁹ This was also upheld by the Committee of Experts of the ACRWC in its decision on the complaints brought before it by the Open Society Justice Initiative (OSJI) on behalf of children of Nubian descent against the government of Kenya in 2011.⁶⁰ The

⁵⁵ Article 7 UNESCO Convention against Discrimination in Education 1960

⁵⁶ CESCR *General Comment No 13*, para 3.

⁵⁷ CRC *Committee General Comment No 1*, para 10.

⁵⁸ Van Bueren, note 29, pp245-248.

⁵⁹ Verheyde, M., *Commentary on the UN Convention on the Right to Education Article 28, The Right to Education*, (Leiden: Martinus Nijhoff, 2006), p.40.

⁶⁰ 002/09 *IHRDA and Open Society Justice Initiative on behalf of children of Nubian descent v. Kenya*. 22 March 2011.

A complaint was brought before the Committee of Expert of the African Charter on the Rights and Welfare of the Child alleging violation of Article 3 of the ACRWC that the children of Nubian descent were treated differently from other children in Kenya. It was also alleged that the children of Nubian descent had less access to educational facilities for the fulfilment of their right to free and compulsory primary education than comparable communities who were not composed of

Committee's recommendation was that the Government of Kenya should adopt a short-, medium- and long-term plan, including legislation, administrative and other measures to ensure the fulfilment of the right to education of these children.

Gender equality has been a focal point at several international summits and conferences since the 1990s,⁶¹ and the elimination of gender disparity in primary and secondary education was one of the Millennium Development Goals aimed to be achieved by 2015.⁶² Article 11(3) (e) of the ACRWC obliges State Parties to take special measures to ensure equal access of girls to education. The Charter also highlights the entitlements of girls who become pregnant before completing their education and should 'have an opportunity to continue with their education on the basis of their individual ability'.⁶³ The high rate of illiteracy prevailing in sub-Saharan Africa countries remains an impediment to the advancement of women and to development in the region.

State Parties are supposed to implement immediate measures both to prevent discrimination arising and to eliminate discrimination where it has already occurred.⁶⁴ The measures are clearly set out: repeal any statutory, administrative instruction or practice which involves discrimination.⁶⁵ This includes prohibiting any form of assistance provided by public authorities to educational institutions which restrict or express preference solely on the ground that pupils belong to a particular group⁶⁶ and granting equal access to education to children who are residents and foreign nationals.⁶⁷

Physical accessibility - schools should be located within a safe physical distance to pupils. All learning environments must be both physically accessible for every child, including the most marginalised. Some children in rural areas have difficulties in accessing education due to a number of factors including distance or safety of travelling to the school. Also, few teachers are prepared to live in the rural areas, so there is always shortage of teachers and this

children of Nubian descent, which is a violation of Article 11(3) ACRWC. They claimed that there is de facto inequality in their access to available educational services and resources.

⁶¹ The 1990 World Conference on Education for All (Jomtien), Article 3(3) of the World Declaration on Education for All; the 1995 World Conference on Women (Platform for Action, Beijing (UN Doc. A/CONF.177/20/Rev.1,1996), paras 263 and 279); the 1990 World Summit for Children (Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990, para 10); and the 2000 World Education Forum (Dakar) (Articles 7(ii) and (v) and 8(vi) of the Dakar Framework for Action.

⁶² UN Millennium Developments Goals, <http://www.un.org/millenniumgoals> [accessed on 3rd May 2013].

⁶³ Article 11 (6) ACRWC.

⁶⁴ Art 3 UNESCO Convention Against Discrimination in Education .

⁶⁵ Art 3(a) and (b) UNESCO Convention Against Discrimination in Education .

⁶⁶ Art 3(c) UNESCO Convention Against Discrimination in Education

⁶⁷ Art 3(d) UNESCO Convention Against Discrimination in Education

have a negative effect on the quality of education these groups of children receive. The State is under an obligation to provide schools that are physically accessible to the learners.

Economic Accessibility- Poverty has been identified as a key obstacle to the enjoyment of the right to education. As such, primary education should be delivered ‘free to all’ without hidden costs to ensure economic accessibility. Insufficient resources on the country level are a factor hampering truly free education and paying for the education of their children is beyond the means of many parents in the poor nations.

The word ‘free’ in Article 28 (1) (a) of the CRC means that education at the primary stage should be secured for all children regardless of family means.⁶⁸ The term ‘free’ must be understood to mean that the delivery of elementary education itself would be free of charge but it is not as certain that other expenses of the student such as transportation costs, books and school uniforms would be covered. It must be noted that States are not required to make all primary education free,⁶⁹ but shall, nevertheless, ensure that free primary education is available.⁷⁰ The requirement that primary education be available free for all has been interpreted by the ICESCR Committee as guaranteeing the availability of primary education without charge to the child, parents or guardians.⁷¹ The CRC Committee considers the cost-free aspect of primary education as crucial and therefore strongly recommends the states to fulfill this obligation.⁷² UNESCO too attaches high importance to the State obligations for free primary education, with the notion that ‘states’ ‘free’, ‘compulsory’ and ‘universal education for all’ is among the most clearly defined of the rights which governments have a duty and responsibility to make a reality.⁷³

Similarly, the 1990 Jomtien World Declaration on Education for All (EFA) and the 2000 Dakar Framework for Action called for the implementation of universal free primary education. At the EFA meeting of November 2002 in Abuja Nigeria, the participating Ministers of Education recommended that, ‘governments in the global south must ensure that free and compulsory primary education is a right reflected in national legislation and

⁶⁸ Newell, P & Hodgkin, R., *Implementation Handbook for the Convention on the Rights of the Child*, 3rded, (Paris: UNICEF, 2008) p.421.

⁶⁹ Art 29 (2) CRC recognises the liberty of individuals and bodies to establish educational institutions.

⁷⁰ Newell & Hodgkin, note 68 p.421.

⁷¹ CESCR *General Comment No11 Plan of action for primary education (art 14)*, E/C.12/1999/4 10 May 1999, para 7.

⁷² Examples; CRC Committee, Concluding Observations: Senegal (UN. Doc. CRC/C/ 46, 1995), paras 128 and 142; Zimbabwe (UN. Doc. CRC/C/ 54, 1996), para 89; Kenya (UN. Doc. CRC/C/111, 2001), para 135; Cameroun (UN. Doc. CRC/C/111, 2001), paras 379-380; Ivory Coast (UN. Doc. CRC/C/ 108, 2001), paras 337-338; the Gambia (UN. Doc. CRC/C/111, 2001), para 452-453; and South Africa (UN. Doc. CRC/C/94, 2000), para 447.

⁷³ UNESCO’s Medium –Term Strategy 2002-2007 (31 C/4, para57) UNESCO, Paris.

practice'. Likewise, at another meeting on EFA in New Delhi, India in November 2003, the action agenda in the Communique issued after the meeting contains commitments by the Ministers to '[enact] national legislation to enforce children's rights to free and compulsory quality education, prevent and progressively eliminate child labour and prohibit early marriage'.⁷⁴ Despite these international and regional commitments, the current Nigerian Constitution still does not have a substantive provision declaring primary education to be free or compulsory.⁷⁵

The push for free education is based on the notion that real developmental change in a country can only occur when the populace are educated. Free education is the only way to ensure compulsory education, and education was made compulsory in order to forge a collective identity. The global attention and call for universal free primary education uncovers many of the barriers to education and gives impetus in ensuring that all children, regardless of race, colour, gender, ethnicity, status or origin enjoy the right to education.

The obligation of parents to ensure the education of their children is meaningless if parents cannot afford the direct or indirect costs of education and children are legally prohibited from working and thus cannot pay towards the cost of schooling. However, since 'universal' rule may not actually oblige parents or governments to implement free and compulsory education for all children if it is beyond their means, international human rights law therefore mandates progressive realisation of the right to education. This necessitates that every state must make provision for free education as soon as possible.

In relation to economic accessibility, there have been controversies over the interpretation of the word 'free education'. Some have argued that it is only tuition fees that should be free and some have counter-argued that other costs apart from tuition fees which the child is required to pay should also be free. Those who argue that only the fees should be free raise the issue that the quality of education will suffer in consequence, where the resources of the State are scarce.

⁷⁴The Third Meeting of the High-Level Group on EFA New Delhi , 10 -12 November 2003 available; http://www.unesco.org/education/efa/global_co/policy_group/ accessed 13 November 2013

⁷⁵S.18 (3) (a) provides that '...the Government shall as when practicable... provide free, compulsory primary education'. This is a progressive realisation meaning that right to education in Nigeria is a partial guarantee. In other words, government has deferred indefinitely efforts to ensure the full realisation of guaranteeing the right to education to the children, as no definite time is given to achieve this objective. Also in S.35 (1)(d) of the Constitution, as regards right to personal liberty, the section states that a child who is incarcerated shall not be deprived of his/her liberty to attend school. This can be construed to mean that child who is incarcerated has a right of access to education, though such children do not attend the regular public school.

Success in the delivery of free education is often measured in high enrolment rates. However, this does not accurately measure the quality of education delivered or the learning environment enjoyed. Though the quantitative side of the right to education is important (ensuring free primary education to all), this is not enough. The right to education is also about quality, culture and context. Increased budget allocation for the purpose of education (both for infrastructure and quality, e.g. new textbooks and the education of teachers) is therefore a precondition for any further development in this area. However, for a state battling with debt servicing this is not feasible. Therefore, the implication is that children who are not able to contribute to the cost of education are permanently shut out of schools, and most children in Sub-Saharan Africa fall in these latter group.

Tomasveski has argued in favour of making tuition and other charges free in primary schools.⁷⁶ She explained that while no tuition fees may be charged in primary education, many cannot afford the numerous and diverse fees that are often charged for enrolment, examinations, building/facilities charges and for extracurricular activities. These costs can be prohibitively high and prevent children from enrolling or force them to drop out before completing primary school. A person's financial status profoundly affects his or her access to, and quality of education. In Nigeria, a large proportion of children from wealthy families attend private schools to secure access to quality education, which most poor families cannot afford. Poverty-based exclusion from qualitative education highlights the impossibility of alleviating poverty through education.⁷⁷ Parents who cannot pay fees may be forced to keep their children out of schools even if education is compulsory. If education is accessible (i.e. available and free), children from disadvantaged or vulnerable categories will be able to benefit equally from the right to education.

Levying charges in public primary schools is illegal in many countries but the law is often unknown or worse still ignored.⁷⁸ Even though there is global consensus on the need to make primary education free, there are also differing opinions in this regards. Controversies around the right to education concern the question whether it should truly be offered free, or whether guaranteeing access to education for those able and willing to pay a certain fee is more realistic, considering the level of economic development in many countries, particularly in Africa. The latter alternative is often promoted by international financial institutions;

⁷⁶ Tomasevski, K. *Education Denied : Costs and Remedies*, (London: Zed Books, 2003), p.15

⁷⁷ Tomasevski, K. *The State of the Right to Education Worldwide: Free or Fee-2006 Global Report*, http://www.katarinatomasevski.com/images/Global_Report.pdf/ [accessed 17 June 2014].

⁷⁸ *Ibid*, p. xix.

although education is recognised as an important factor in poverty reduction, they do not appreciate it strictly as a human right. Thus, considering that the education sector in many developing countries is dependent on foreign lending and development programs, it remains a big challenge to move the development cooperation towards a human rights-based approach.⁷⁹

The level of development with regard to implementing free and compulsory primary education in Africa differs from country to country. For example, the South African Constitution states that everyone has the right to ‘[a] basic education, including adult basic education; and [...] to further education, which the state through reasonable measures must make progressively available and accessible’,⁸⁰ in the meantime, primary education is not free for everyone in South Africa.⁸¹ In some parts of Nigeria, the parents of school children bear the cost of the furniture and educational materials used by the children. The government stated in 2010 that there is no legislation that guarantees the right to education, and also reiterates its policy of cost sharing in the financing of education; parents and communities are expected to contribute to the education cost of their children in the form of user fees.⁸² Thus a child can be excluded from school for failing to pay the demanded charges, even if the parents are unable to pay them. Therefore it cannot be said categorically that primary education is freely guaranteed within the context of the Nigerian Constitution.

It must be emphasised that no child should be denied the opportunity to complete a good quality primary education because it is unaffordable. Also child labour must not stand in the way of education. The inclusion of children with special needs, from disadvantaged ethnic minorities, children from remote and isolated communities, from urban slums and others excluded from education must be an integral part of strategies to achieve universal primary education.⁸³ The ICESCR Committee has observed that:

The nature of this requirement [that education is free] is unequivocal. The right is expressly formulated so as to ensure availability of primary education without charge to the child, parents or guardians. Indirect costs such as compulsory levies on parents (sometimes

⁷⁹ Halvorsen, K, ‘Notes on the Realization of the Human Right to Education’. 12, *Human Rights Quarterly* pp351-52

⁸⁰ S. 29 Constitution of South Africa

⁸¹ Department of Education, ‘Education for All (EFA) Country Report: South Africa’ (2008) p.20.

⁸² *SERAP v. Federal Government of Nigeria & UBEC*, ECW/CCJ/APP/12/7.

⁸³ Tomasevski, K., *Human Rights Obligations in Education: The 4A Scheme* (The Netherlands: Wolf Legal Publishers 2006) p.41.

portrayed as being voluntary, when in fact they are not) or the obligation to wear a relatively expensive school uniform should be eliminated.⁸⁴

However the Committee has noted that other indirect costs may be permissible, subject to examination on a case-by-case basis.⁸⁵ However the Committee is yet to specify exactly which indirect costs may be permissible. Legal guarantees may be a reflection of a government's commitment to the right to education. Without an effective mechanism to hold the government accountable for compliance with that duty it is uncertain whether the government will comply and demonstrates the need for rights to be enforceable.

Primary education must be compulsory, meaning that at the level of primary education, the States Parties are not only obliged to make primary education free, they also should make it compulsory. The principle of compulsory education is shared by several human rights treaties.⁸⁶ It ensures that the child's right to receive education shall not be impeded by for instance parental neglect, abuse or ignorance, cultural resistance or child labour. Many children would like to be able to attend compulsory education but because of a combination of factors, including the necessity to contribute to the family's basic survival, the distance of rural schools, traditional opposition to the education of girls and the imposition of school fees, they are unable to receive even the minimum of education.

The CESCR has commented as follows on the requirement of 'compulsory' education:

The element of compulsion serves to highlight the fact that neither parents nor guardians nor the State are entitled to treat education as optional the decision as to whether the child should have access to primary education...⁸⁷

Making primary education 'compulsory' is dependent on making it 'free'. Parents cannot be forced to send their children to school, if it is unaffordable for them. To sum up, although the two pillars of primary education- free and compulsory are mentioned together in international human rights instruments,⁸⁸ they are also essential in order to make primary education

⁸⁴ CESCR General Comment No 11, para 7.

⁸⁵ *Ibid*

⁸⁶ Article 26(1) of UDHR; Article 13(2) (a) and 14 of the CESCR; Article 13(3)(a) of the Protocol of San Salvador to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights and Article 11(3) (a) of the African Charter on the Rights and Welfare of the Child.

⁸⁷ CESCR General Comment No.11, para 6.

⁸⁸ Article 26(1) of UDHR; Article 13(2) (a) and 14 of the CESCR; Article 13(3)(a) of the Protocol of San Salvador to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights and Article 11(3) (a) of the African Charter on the Rights and Welfare of the Child.

accessible. Sadly, most developing countries including Nigeria do not currently guarantee effective enjoyment of the right to education.

3.3.3 Acceptability

Acceptability refers to the form and substance of education, including curriculum and teaching methods; these have to be relevant, culturally appropriate and of good quality⁸⁹ and in accordance with the best interest of the child. Acceptability also includes a safe and healthy school environment. Acceptability addresses the form and substance of the education with regard to both quality and appropriateness.⁹⁰

The scope of acceptability of education has been broadened in international human rights jurisprudence to include a system of education that seeks to protect learner's right on issues such as language rights, parental choice and discipline of pupils. It is submitted that a State must respect the freedom of individuals to be taught in his/her mother tongue and to attend the school of appropriate religious affiliation. Education should also respect the cultural identity of minorities and indigenous populations. In making education acceptable to children there should be respect for the child's cultural identity. In many countries there is a significant proportion of children for whom the language of instruction is not their mother tongue imposing a major obstacle to learning. There is explicit obligation on States to ensure that all children can be taught in the dominant spoken language of the area, and States are entitled to determine the languages of instruction.

The form of education including curricula and teaching methods have to be relevant, culturally appropriate and of good quality to students. The CRC Committee directs that the curriculum must be of direct relevance to the child's social, cultural, environmental and economic context and to the child's present and future needs taking into account the child's evolving capacities.⁹¹

The right of every child to a quality education enables him or her to fulfil his or her potential, realise opportunities for employment and develop life skills. To achieve this goal, education needs to be child-centered, relevant and embrace a broad curriculum and be appropriately resourced and monitored. In several developing nations, children go through schools without acquiring the basic competence in literacy and numeracy because of poor quality of teaching

⁸⁹ CESCR *General Comment 13*, para 6(c).

⁹⁰ Tomasevski, 'Preliminary Report of the Special Rapporteur on the Right to Education', UN Doc.E/CN.4/1999/49 (1999 Report), p. 62-69.

⁹¹ CRC *General Comment No1*, para 9.

and teaching materials. Acceptability requires a guaranteed quality of education, minimum standards of health and safety, and professional requirements for teachers which have to be set, monitored and enforced by the government.⁹²

Acceptability through the development of international human rights law includes discipline in schools. Corporal punishment is viewed by the ICESCR Committee as inconsistent with the fundamental guiding principle of international human rights law.⁹³ As such, a State party is required to take measures to ensure that discipline which is inconsistent with the Covenant does not occur in any public or private educational institutions within its jurisdiction. This is also the stand of the CRC Committee, whereby it states that the use of corporal punishment does not respect the inherent dignity of the child, and that schools must be child-friendly and be consistent in all respects with the dignity of the child.⁹⁴ Non-violent approaches to school discipline are encouraged in schools instead.

In most African states, corporal punishments are still being applied in schools and States are not objecting to its application, because the African culture encourages it and many parents remain supportive of it. In Uganda, corporal punishment was legalised by the Education Act,⁹⁵ which attempted to confine the administration of corporal punishment to head teachers. In its initial report to the CRC Committee, Ugandan representatives acknowledged that teachers do cane children in all schools.⁹⁶ In Nigeria corporal punishments are applied in schools too and there is no legislation that prohibits corporal punishment. This is inconsistent with the human dignity of the child and exposes the child to public humiliation. Other measures of corrections apart from caning are being encouraged to be used by schools. Indicators for acceptable education are the relevancy of taught content and non-discrimination. Acceptability also means that the school itself is safe and teachers are professionally skilled and practice appropriate discipline. In sum for education to be acceptable, it has to be regulated, to respect human rights, and include quality control over contents, methods and staff. There is obligation on the state to ensure quality of education through elaboration of standards and monitoring of compliance to these standards, even when education is provided by private entities.

⁹² Tomasevsk. , *Education Denied- Costs and Remedies*, note 76 at p.51.

⁹³ CESCR, *General Comment No13*, at para 41.

⁹⁴ CRC *General Comment No1* at para 8.

⁹⁵ Watson,C, *Children First. Talking with Your Community about Child Welfare and Development*, (Kampala Republic of Uganda: UNICEF, 1996), p.25.

⁹⁶ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: State Party Report: Uganda*, 17 June 1996, CRC/C/3/Add.40, available at: <http://www.refworld.org/docid/3ae6af694.html> [accessed 26 February 2014], para 211.

3.3.4 Adaptability

Adaptability in education relates to the flexibility of the system of education to adapt to the changing needs in society⁹⁷ and to take on the collective identity of the diverse social and cultural setting. The curriculum must reflect the contemporary national and educational objectives and the syllabus need to be revised continuously to make it useful and relevant for the evolving situations of pupils. Adaptability addresses the need for education to be flexible because an education system that is not adaptable is likely to have a high dropout rate for students.⁹⁸ A very important aspect of education is its adaptability to the situation of children's background. The contents of education need to be relevant to the children's lives, irrespective of their geographical location. Education should therefore be very practical. In crux, adaptability requires schools to adapt to children, following the yardstick of the best interests of the child as stipulated in the CRC. Adaptability, from Tomasevski's explanation is a reversal of the heritage of forcing the children to adapt to whatever school may have been made available to them.⁹⁹

The right to education is about access and numbers of pupils enrolled; however, it extends beyond numbers to include the delivery of quality education that is available, accessible, acceptable and adaptable to the needs of learners.

3.4 Plan of Action for Implementation of the Right to Compulsory Free Primary Education

Article 14 of the ICESCR lays down State obligations for a detailed plan of action for the progressive implementation of the right to education. The provision of Article 14 states:

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

This specifies that the plan should include the number of years within which compulsory education will become freely available to all, and that this number of years should be

⁹⁷ CESCR *General Comment 13*, para 6(d).

⁹⁸ The Right to Education Project, Education and the 4As; <http://r2e.gn.apc.org/node/226> [accessed 21 June 2014]. See also; CESCR *General Comment No 13*, para 6.

⁹⁹ Tomasevski, *Education Denied- Costs and Remedies*, note 76 at p.52.

‘reasonable’. There should be a timetable for implementing the plan. The same would apply to states which originally introduced free primary education but have been unable to sustain it and now impose fees on primary school attendance. The provision would also apply to states which originally introduced free primary education but have reverted to the imposition of school fees prior to becoming a party to the ICESCR. According to ICESCR, state parties should ensure free and compulsory primary education, make available and accessible secondary and higher education which should progressively made free of charge.¹⁰⁰

In spite of the obligations mentioned in Article 14, a number of State Parties including Nigeria have neither drafted nor implemented a plan of action for free and compulsory primary education.¹⁰¹ The Committee is aware that many diverse factors have made it difficult for State parties to fulfill their obligation to provide a plan of action. For example, the Structural Adjustment Programs, the debt crises that followed in the 1980s and the financial crises of the late 1990s, as well as other factors, have greatly exacerbated the extent to which the right to primary education is being denied. However, a State party cannot escape the unequivocal obligation to adopt a plan of action on the ground that the necessary resources are not available. Sadly though, states seem to get away with it. If the obligation could be avoided in this way, there would be no justification for the unique requirement contained in Article 14 which applies, almost by definition to situations characterized by inadequate financial resources. By the same token, and for the same reason, the references to ‘international assistance cooperation’ in Article 2(1) and to ‘international action’ in Article 23 of the ICESCR are of particular relevance in this situation. Where a State party is clearly lacking in the financial resources and/ or expertise required to ‘work out and adopt’ a detailed plan, the international community has a clear obligation to assist.¹⁰²

In appropriate cases, the Committee encourages State Parties to seek assistance of relevant international agencies, including the International Labour Organisation (ILO), the United Nations Development Programme (UNDP), the United Nations Educational Scientific Organisation (UNICEF), the IMF and the World Bank, in relation both to the preparation of plans of action under Article 14 and their subsequent implementation. The Committee also calls upon the relevant international agencies to assist State Parties to the greatest extent

¹⁰⁰ Art 14 ICESCR

¹⁰¹ For example, in its Concluding observations: Nigeria, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, CRC/C/NGA/CO/3-4, 21 June 2010, para 12. Committee is concerned that an evidence-based cost plan for the operationalisation of the Action Plan remains a challenge.

¹⁰² CESCR, *General Comment No11* paras 8&11 .

possible to meet their obligations on an urgent basis. This applies explicitly to poorer nations. The resultant effect of this commitment is an increasing number of such countries reintroducing free primary education at the turn of the millennium buttressed by the global commitments and declarations such as the MDG and EFA.

There is a great deal of opposition worldwide, to remoulding education to fit the World Bank's non-right based model.¹⁰³ Under the World Bank's model, financial responsibility for education has been transferred from governmental to family budgets meaning that children of the poor cannot go to school. International aid for education remains minuscule.¹⁰⁴ Insufficient funding impedes free education for all school age children, specifically in those countries of widespread poverty. Insufficient resources are routinely emphasised in state parties' reports required by human right treaties as the key obstacle to making education free.¹⁰⁵ Although international cooperation has been anticipated in international human rights law to underpin the right to education, global education and development finance strategies have proved an obstacle to it. For example, the World Bank's non-right based approach results in violations of legal requirements that education should be free, as will be further analysed later in this chapter.

3.4.1 The Concept of Progressive Realisation of Education Rights

The words 'achieving this right progressively' recognise that the provision of free education is expensive,¹⁰⁶ financially and otherwise.¹⁰⁷ However, 'progressive realisation' is not intended to be a get-out clause, rather it is intended to make the end goal more achievable. States are obliged to improve continuously the conditions of ESC rights including education rights and must not take any retrogressive measures in respect of any of the rights.¹⁰⁸ Both the CRC (Article 4) and the ICESCR (Articles 2, 13 & 14) require that States undertake all

¹⁰³ Tomasevski, *Education Denied*, note 76, p 98.

¹⁰⁴ *Ibid*

¹⁰⁵ UN Human Rights Committee (HRC), Concluding observations on the initial report of Sierra Leone, 25 March 2014, CCPR/C/SLE/CO/1, available at: <http://www.refworld.org/docid/533562eb4.html> [accessed 27 February 2014] UN Committee on the Rights of the Child (CRC), List of issues in relation to the combined third to fifth periodic reports of the United Republic of Tanzania, 18 July 2014, CRC/C/TZA/Q/3-5, available at: <http://www.refworld.org/docid/54ae8c474.html> [accessed 27 February 2014], UN Committee on the Rights of the Child (CRC), Concluding observations on the consolidated third and fourth periodic reports of India, 13 June 2014, CRC/C/IND/CO/3-4, available at: <http://www.refworld.org/docid/541bee3e4.html> [accessed 27 February 2014], UN Committee on the Rights of the Child (CRC), Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : combined 2nd, 3rd and 4th periodic reports of States parties due in 2010 : Congo , 18 September 2012, CRC/C/COG/2-4, available at: <http://www.refworld.org/docid/52de5b1e4.html> [accessed 27 February 2014].

¹⁰⁶ Newell, & Hodgkin, note 72, p.407.

¹⁰⁷ CESCR *General Comment No13*, para 9

¹⁰⁸ Ssenyonjo, M. 'Reflections on States Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law', (2011) Vol.15, No.6, *The International Journal of Human Rights*, 969 at 977.

appropriate legislative, administrative and other measures to the maximum extent of their available resources for the implementation of education rights. In its General Comment, the ICESCR Committee stated that progressive introduction of free education means that while States must prioritise the provision of free primary education, they also have an obligation to progressively introduce free secondary and higher education.¹⁰⁹ The Committees that monitor these treaties have both argued that ‘even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the highest possible enjoyment of relevant rights under prevailing circumstances’.¹¹⁰ If States fail to meet minimum core obligations, they are required to demonstrate that every effort was made in attempt to so.¹¹¹

3.5 International Cooperation in the Realisation of Free and Compulsory Primary Education

To enable all States Parties to improve their capabilities and skills, States Parties are under a duty to promote and encourage international cooperation in educational matters, particularly taking into account the needs of developing states, regardless of whether or not the developing state is a party to the Convention.¹¹² The term ‘international cooperation’ refers to bilateral cooperation as well as to cooperation by States, which involves donor countries and recipient countries.

Article 28(3) of the CRC provides the following in relation to international cooperation on matters concerning education:

States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

This is the most comprehensive call on international cooperation in a binding human rights instrument addressed to the States Parties on educational matters.¹¹³ In Article 28(3) of the

¹⁰⁹ CESCR General Comment No 13 para 6(b) (iii).

¹¹⁰ CESCR *General Comment No. 3*, CRC Committee *General Comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, paras 6-8.

¹¹¹ ICESCR, Article 2(1); see also CESCR *General Comment 3, The Nature of State Parties Obligations*; CRC Committee *General Comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, para 8.

¹¹² Art. 23(4) ICESCR

¹¹³ Verhyede, note 59 p.65.

CRC, the right to education is approached as a third generation right.¹¹⁴ Under the framework of the right to education, the beneficiaries in developing countries have a right to solidarity. In its general Comments, the ICESCR Committee encourages States parties to seek assistance of relevant international agencies in relation both to the preparation of plans of action as required under Article 14 and their subsequent implementation. The Committee also calls upon the relevant international agencies to assist State parties to the greatest extent possible to meet their obligations on an urgent basis.¹¹⁵ In the framework of its competence under Article 45(b) of the CRC, the CRC Committee has equally identified a need for technical advice and assistance and consequently referred reports to UNICEF and UNESCO.¹¹⁶ In a complementary vein, the CRC Committee has pointed out that:

[...] when States ratify the Convention, they take upon themselves the obligations not only to implement it within their jurisdiction, but also to contribute through international cooperation, to global implementation.¹¹⁷

As such, States that are in a position to assist others should fulfill the obligation of international cooperation for the realization of economic, social and cultural rights, including the right to education.¹¹⁸

Articles 10-14 and 21 of the Dakar Framework for Action, as well as in some other UNESCO instruments,¹¹⁹ and in the 1993 Vienna Declaration and Programme of Action,¹²⁰ all have similar provisions on the necessity of international cooperation in the effective realisation of the right to education in human rights instruments.

In 2006, for example, the British Chancellor of the Exchequer (later Prime Minister) Gordon Brown highlighted the need to assist in funding free primary education programme in poor nations. He remarked as follows;

¹¹⁴ Nowak, Manfred "The Right to Education", in: Asbjorn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, Second Revised Edition, (Dordrecht: Martinus Nijhoff Publishers, 2001), pp. 245-271, at pp. 254-255.

¹¹⁵ CESCR Committee, *General Comment No11*. See also articles 4 & 24(4) CRC.

¹¹⁶ Under Article 45 the CRC Committee has the competence to send reports to specialized agencies, the United Nations Children's Fund and other competent bodies from States Parties that contain a request, or indicate a need, for technical advice or assistance.

¹¹⁷ CRC Committee, *General Comment No5: General measures of implementation of the Convention on the Rights of the Child* (UN Doc. CRC/GC/2003/5, 2003), para.7.

¹¹⁸ CESCR Committee, *General Comment No3*, note 19, para. 14. See also, Articles 2, 23 and 15(4) of the ICESCR,

¹¹⁹ Article 1(2) (c) of the UNESCO Constitution, see also articles 43-45 of the Education Recommendation concerning education for international understanding, co-operation and peace and education relating to human rights and fundamental freedoms, adopted on 19 November 1974.

¹²⁰ Vienna Declaration and Programme of Action, para 34.

I want to particularly draw attention to the need for free primary education. It must be universal, but it must be free. I was in Kenya more than a year ago and I found that in the week that Kenya had made primary education free for its children, 1 million children who had not had schooling turned up to be registered for school, just one signal of the demand for education when it is available free of charge. And from Kenya, Tanzania, Uganda, Malawi, Zambia, we know that more than 1 million children in each of these countries were added to the education roles when education was made free. So part of our commitment to funding is to make it possible for primary education to be both universal and free. And I hope that we can move this forward quickly in the next few months.¹²¹

Therefore in order to tackle the pressing implementation of free and compulsory primary education problem, developing countries including Nigeria, need assistance from the international community.¹²²

3.6 Global Political Commitments

There have been various global political commitments by different states of the world to ensure free universal primary education, some of which have target dates which have not been met to date. Some examples of such commitments are:

Jomtien Conference on Education for All (1990) which made a commitment that:

Every person - child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs [...] access to, and completion of, primary or basic education by the year 2000.¹²³

Dakar World Education Forum (2000), which made a commitment for: 'Ensuring that by 2015 all children [...] have access to and complete free and compulsory primary education of good quality.'¹²⁴

United Nations Millennium Development Goals (MDGs/UN) (2005), which made a commitment to: 'Ensure that by 2015 all children everywhere, boys and girls alike will be able to complete a full course of primary schooling.'¹²⁵

¹²¹ Gordon Brown, *Annual meetings of the World Bank and the International Monetary Fund (IMF)*, in Singapore, September 2006. Available; http://www.unicef.org/publications/files/Six_Steps_to_Abolishing_Primary_School_Fees.pdf [accessed 10 October 2013].

¹²² Wabwire, M., 'Implementing the Social and Economic Rights of Children in Developing countries: the place of international assistance and cooperation,' (2010) 18: *International Journal on Children's Rights*, pp 357-358.

¹²³ Article 1(1) World Declaration on Education For All <http://www.unesco.org/education/wef/en-conf/Jomtien%20Declaration%20eng.shtm> [accessed 13 April 2014]

¹²⁴ Paragraph 7(ii) The Dakar Framework Education For All: Meeting Our Collective Commitments The World Education Forum (26-28 April 2000, Dakar),(Paris: UNESCO, 2000), p.8.

World Summit Outcome (2005), which stated that: ‘We affirm our commitment to support developing country efforts to ensure that all children have access to and complete free and compulsory primary education of good quality.’¹²⁶

A human rights-based approach to education is stronger than all these global targets. While under the human rights based approach, international human rights laws obligate that primary education shall be free and compulsory, under global political commitments, MDG 2 for example, states that government is to ‘ensure’ that by 2015 children everywhere will be able to complete full course of primary schooling, without regarding the absence of provision as a violation of rights. The World Summits affirm their commitment to ensure that children have access to free and compulsory education without doing much regarding implementation. Most of the time, global targets have been agreed upon and flouted because there is no single or effective set of rules for realising them and against breaking them. There are no coherent checks between external policy priorities of creditor and donor countries and their internal educational policies. Quite a few countries which subscribed in 2000 to the most broadly accepted set of global targets (the MDGs) have changed in the six years after they were adopted. In a world of partnership, blame is mitigated and no one is responsible.¹²⁷

The argument that education is a human right and not just a global target calls for comparison between international human rights law and global targets. Under international human rights law, international obligations form part of international law, which pertain to the state and are not affected by changes of government. For global targets, the MDGs and the EFA and similar output of international conferences are often discarded when governments change. A new government is not necessarily bound by political commitments of a previous government. Universal human rights standards are supposed to apply globally. The key principle of non-discrimination mandates equal rights for all. For global targets, it is usually a quantitative target, as an increase in school enrolments from 40% to 60% is applauded as a success not recorded as a violation of the right to education of the 40% of children who remain excluded from school.¹²⁸

¹²⁵ Target 2A MDG2 <http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-all/education-and-the-mdgs/goal-2/> [accessed 13 April 2014].

¹²⁶ UN General Assembly, 2005 World Summit Outcome : resolution / adopted by the General Assembly, 24 October 2005, A/RES/60/1, available at: <http://www.refworld.org/docid/44168a910.html> [accessed 18 April 2014], paragraph 44.

¹²⁷ Klees, S. ‘World Bank education policy: new rhetoric, old ideology’, (2002) vol 22 *International Journal of Educational Development*, p.455.

¹²⁸ Tomasevski, *Education Denied: Costs and Remedies*, note 76, p.3

3.7 Role of Private Institutions

States are the providers of public primary education, but under international law, private actors too have the liberty to establish and direct educational institutions.¹²⁹ This means that individuals, organisations, religious institutions, companies or other bodies are free to open schools or other educational institutions and administer and govern them according to their wishes with certain limitations. If private entities fail to comply with the State's minimum standards then the State must intervene. While the State is supposed to provide educational services as the primary education provider, private education is seen as a parallel system offering an alternative choice for parents and students. The fear is that with the influx of private institutions, government will relax in the upkeep of the public schools.

While the significant role private educational institutions play must be acknowledged, the emphasis remains on free and compulsory primary education provided by the state. This is particularly true within the African regional human rights framework, where privatisation of essential services is viewed as a potential threat to the full realisation of human rights.¹³⁰

3.8 Challenges and Opportunities

Many governments of the developing nations do not give education sufficient priority in their national budgets. Too many do not use resources for education effectively and efficiently. Passing the cost burden on to the poor parents has led to devastating impact on enrolment and retention as incidental charges affect children from poor households resulting in high drop-out rates, low enrolment and low retention rates. Debt relief to the poorest countries remains inadequate, with too little being provided too few countries. Often the funds come late, at times inadequate and are terminated before the completion of the project they are meant for; as a result it is difficult for countries to plan effectively on how the funding will be disbursed. It is submitted that debt reduction programmes should offer governments an opportunity to give priority to education within overall poverty reduction frame works. In addition, the proportion of international assistance allocated to basic education in the 1990s has reduced significantly in the last decade; as such, there is an overall decline in total development assistance.

¹²⁹ Article 13 (4) ICESCR & Article 11(7) ACRWC.

¹³⁰ *Pretoria Declaration on Economic, Social and Cultural Rights, 2004*, <http://www.achpr.org/instruments/pretoria-declaration/> [accessed 7 July 2014], para 3(j).

Inadequate institutional capacity and weak political processes still prevent many governments from responding to the priorities of their populace. In most African States there is frequent change in the leadership of the state, so continuity of on-going projects are discontinued as successive leaders may have different priorities and goals. This hinders the development in the educational sector as well.

Despite the challenges, positive prospects also exist. There is greater operation between national and international agencies at state level, through structures and mechanisms such as Comprehensive Development Frameworks, Poverty Reduction Strategy Plans and UN Development Assistance Frameworks. These agencies offer the potential for resource-related partnerships for basic education. There is also a growing contribution of civil society to democratic processes, the fight against corruption and the process of decentralisation that is on-going in many countries all have the potential to contribute greatly to building a solid foundation for the achievement of effective, equitable and sustainable Education for All.

3.9 Conclusion

The right to education is protected through many international human rights instruments,¹³¹ which have provided the foundations for addressing all human rights issues on providing universal free and compulsory education for children. It is apparent from the foregoing that over the past fifty years the international community has embraced education as a human right which is evidenced by the rate of ratification by States to these instruments.¹³² Human rights have been affirmed but continuously violated by the different States, particularly in Africa.

This chapter has highlighted the fundamental principles of the right to education and the roles of different duty bearers such as the state, parents, and the international community in fulfilling children's rights to education effectively. The recurrent theme in global debates about education is the cost of providing it; hence there is both the reluctance to affirm that education is a human right and the silence about the cost of denying education.¹³³ The need to protect and provide access to education cannot therefore be postponed until a later stage of

¹³¹ UDHR, ICESCR, CRC, ACRWC and UNESCO Convention against Discrimination in Education.

¹³² For example the CRC has now been ratified by all States in Africa except the newly created South Sudan. Somalia which was initially the last state in Africa has ratified the CRC on 20 January 2015. Available on: http://www.africanchildinfo.net/index.php?option=com_k2&view=item&id=6915#.VMfuXdIvnYo [accessed 25 January 2015].

¹³³ Tomasevski, *Education Denied: Costs and Remedies*, note 76, p.1.

economic growth and improved financial resources. Resources must be committed for service delivery and effective law enforcement.

The rights within education underline the intrinsic link of the rights-based approach to just and equitable socio-economic development. The rights-based approach involves a variety of administrative procedures and institutions to ensure that human rights are implemented. This is why the rights-based approach requires states to address urgently the problems affecting the implementation and enforcement of the right to education. Respect, protection and fulfilment of the right to education require a strong commitment on the part of States. In the developing world, most individuals are ignorant of the law and so are not aware of their basic right to free education, much more the fundamental principles of the right to education. There is need to let them know how to assert and defend the right to education.

There is the urgency of strengthening human and financial resources in the area of primary education for children as millions of children are still not in schools. The target date of 2015 to ensure all children have free primary education,¹³⁴ will not be realised by most states including Nigeria. The right to education must be perceived as a necessary doorway through which children can access other cardinal rights, as it is the foundation stone of a rights-based means of their achieving their rightful places in the world both as children and as adults. Primary education is the basis for high-quality skills development in numeracy and literacy which will lead to advancement to higher educational level. It is not only right to education but also rights in education.

¹³⁴ United Nation Millennium Development Goals, (MDG 2) 2005, <http://www.un.org/millenniumgoals/education.shtml> [accessed 12 April 2014].

Chapter Four

Development of Primary Education in Nigeria

‘Education is the key and the index to our development. We can grow into an adult and responsible nation only if our progress is founded on sound education of mind, body and spirit. We have heard much in recent months about universal primary education and this is an objective which we all cherish and must be attained as rapidly as possible.’¹

4.1 Introduction

The right to education was demonstrated under the rights-based approach principles in the previous chapter. This was aimed at seeking to raise the States’ level of accountability in meeting their obligations to respect, protect and fulfil the right to education under international human rights law. Following from that chapter, the main focus of this present chapter is to evaluate the development of free and compulsory primary education in Nigeria within the historical, political, socio-economic and cultural contexts of the country. The aim is to critically analyse the successes and problems in ensuring access to free primary education for children in Nigeria by the past and present governments, and to explore the sustainability of the free primary education scheme by the country.

The chapter is divided into four sections. The first section briefly examines the different types of education recognised in Nigeria, while the second section discusses the development of formal Western education in Nigeria from its introduction by the missionaries in the nineteenth century. Starting with a historical overview, the third section examines and analyses the development of free primary education in Nigeria from the colonial and pre-independence periods. This will explore the roles of the colonial regimes in the formulation of the foundational policies on access to primary education in Nigeria. This section also highlights the influence of the British form of education in the schools’ curriculum in Nigeria, as well as the educational development during the transition to independence, through the independence era, and the post- independence era up to the present time. The section will evaluate the role of successive governments in educational development in Nigeria, identifying factors that have been the drivers and inhibitors of the implementation of

¹ Adegoke Adelabu , The Nigerian Federal Minister of Natural Resources and Social Services , wrote in the preface of the *Annual Report of Department of Education for the Period 1st April 1952- 31st March 1953*.

free primary education since independence. Finally, the fourth section critically assesses the various free primary education initiatives that have been implemented in Nigeria.

4.2 The Different Types of Education Recognised in Nigeria

Generally, there are three main forms of education, namely: informal education, non-formal education and formal education. First, informal education is - where the learner learns from family, peer, neighbours, religious teachers and community. Such education is acquired by learning and is confined to a specific activity; examples are the learning of trades as in apprenticeship, and learning under a religious teacher as in a Quranic school. Second, non-formal education- is a semi structural type of education, which offers opportunities to all categories of people, and is not confined within a fixed framework of time and place, example is adult education whereby people in the urban, villages and rural communities have educational instructions on reading and writing. Instructions are usually in the local dialect. Coombs defines non-formal education as; “any organized educational activity outside the established formal system whether operating separately or as an important feature of some broader activity that is intended to serve identifiable learning clienteles and learning objectives.”² The third form of education is formal education which is regulated by statutory laws and is controlled by the state.³ The system of formal education is centrally designed, curriculum is uniform in content and both the entry and exit points of primary education are determined.⁴ This is the regular school education and the state is its chief provider but it can also be provided by private individuals or groups. Verheyde describes formal education as ‘structured, chronologically graded at each stage and given in an educational institution’.⁵ Under Nigerian educational systems, three main types of education are recognised. These are traditional education, Islamic education and western education, now formal education⁶. The traditional and Islamic education are both informal education and the western education is the formal type of education.

² Coombs, Philip, ‘Should One Develop Non-formal Education?’, (1973) Vol. III, No. 3, (Autumn) *Prospects*, pp. 288 – 90.

³ SS. 1 & 12. National Policy on Education, 2004,

⁴ *Ibid* S.4

⁵ Verheyde, M., *Commentary on the Right to Education*, (Leiden: Martinus Nijhoff 2008), p.12.

⁶ Fafunwa, A., *History of Education in Nigeria*, (London: George Allen & Unwin, 1974), p.16

4.2.1 Traditional Education in Nigeria

Education goes back centuries in Nigeria. The main system of education practiced in Nigeria in pre-colonial times is known as traditional education. It is different from western or Islamic education in a number of ways, and handed down to the succeeding generation, it is still widely practiced across Nigerian communities today. It is an informal type of education which starts from birth and takes place in and outside the home-setting.⁷ Traditional education is a lifelong process whereby the child receives an education aimed at learning to live in conformity with the conducts of the community. The child is expected to acquire approaches, morals, skills and knowledge from daily experience and the educative influences in his or her environment, which he or she acquires from family and neighbours, work and play, and the community.⁸

The main objective of traditional education is to enable the child grow into a functional member of his family and group.⁹ Traditional African societies have, through informal education developed the means of creating and passing on their culture from one generation to the next.¹⁰ The aim of traditional education is to 'produce an individual who is honest and respectable'¹¹. Traditional education emphasises the development of the physical wellbeing of the child, it enables the child to meet the requirements of his or her environment.¹² Teaching takes the form of proverbs, riddles, poetic verses, games, recitations and folklores. Farming, fishing, trading, hunting and weaving are introduced to the child quite early. Most of the occupations are run on an informal apprenticeship basis. In Nigeria the first school is the home: the teachers are the parents and the elders in the family. 'The curriculum is life and learning is by observation.'¹³ McWilliam and Kwamena-Poh, listed two main purposes of traditional education as follows;¹⁴ first is the inculcation of good character in the young members of the community, and the second is to give them adequate knowledge of their history, beliefs and culture. In traditional society the child is taught local history and geography from youth thus enabling them to participate fully in social life.¹⁵ There are

⁷ *Ibid*

⁸ Coombs, note 2, p 288.

⁹ Falola, T., *Culture and Customs of Africa*, (Connecticut: Greenwood Resources, 2001) p. 12.

¹⁰ *Ibid*

¹¹ *Ibid* p.20.

¹² Moumouni, A. *Education in Africa*, (London: Andre Deutsch, 1968), p.16.

¹³ Taiwo, C.O., *The Nigerian Education System: Past, Present and Future*, (Lagos: Thomas Nelson Nigeria 1980), p.14.

¹⁴ McWilliam, H.O. & Kwamena-Poh P.M. *The Development of Education in Ghana: An outline* (London: Longman, 1975) p.34.

¹⁵ Falola, note 9, p.14.

similarities in the goals of traditional education in Nigeria and the formal education under international human rights law. This bears a similarity with the aims of education in the CRC; which is to ‘empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence.’¹⁶ In other words, all educational system whether traditional or Western oriented, seek to achieve similar goals; to enable the child develop the abilities, outlooks and behaviour which are of positive values to the society in which the child lives.

While formal education is just one of six components included in Universal Basic Education (UBE),¹⁷ the implementation guidelines for the UBE stress the inclusion of non-formal education, skills acquisition programmes and the education of special groups such as nomads and the fishing communities.¹⁸ Other components relate to early childhood, literacy and non-formal education or apprenticeship training for youths outside the formal education system. The National Policy on Education (NPE) also embraced non-formal education.¹⁹ With the realisation that formal education is limited to a specific age group, the government acknowledges the need for an alternative education system for those who fall outside the scope of formal education, and this is why it has integrated the non-formal education into the modern system of education.

4.2.2 Islamic Education in Nigeria

Islamic education is also a recognised form of education in Nigeria. Islam was introduced into the Northern parts of Nigeria as early as the eleventh century AD. The objective of Islamic education is to teach Arabic and the Qur’an. Levels are stratified not by age but by competences and the ability of the learner to master the content of each level.²⁰ The age of enrolment into this school could be from seven. There is no fixed amount for fees; it varies from teacher to teacher, and could be paid in cash or kind.²¹ The teacher may also receive

¹⁶ CRC General Comment 1 *The Aims of Education Article 29(1)*, CRC/GC/2001/1, 17 April 2001, para 12.

¹⁷ S.15 Compulsory, Free Universal Basic Education Act, (UBE Act) 2004, see also <http://ubeconline.com/> accessed 21 December 2013

¹⁸ Universal Basic Education Commission, *Standard Action Plan*, (Abuja: UBEC 2004)

¹⁹ S.4 paras. 31, 34 & 36 National Policy on Education.

²⁰ Gbadamosi, G. ‘The Establishment of Western Education among Muslims in Nigeria 1896-1926’, (1967), 4(1), *Journal of the Historical Society of Nigeria*, p.89-115 at 89.

²¹ Fafunwa, note 6 p 63.

gifts such as grain, meat, a piece of cloth, or a prayer mat.²² The teacher's qualification is that he is versed in the Quran.²³

Traditionally, Islamic education is carried out in three stages in Nigeria. The first stage is the piazza which is the equivalent of our present primary school. Children start the piazza at the ages of five and six. The course lasts five to seven years.²⁴ Here the child is taught the rote memorisation of the Quran in Arabic. The second stage is the tablet or beginners stage called *Makarantar Allo*.²⁵ During this stage, the pupil learns to read the Arabic characters and alphabets, and later followed by learning the interpretations of the Quran and the commentaries. The latter is an advanced study of the Qur'an, subjects include the study of the Hadith and aspects of Islamic jurisprudence. The third stage is the most advanced, leading to study in Islamic law, medicine, astrology and mysticism.²⁶ Islamic education, and even in a modernised form in some places, has remained a challenge in its integration with the contemporary system of formal education in different parts of Nigeria today. Islamic education is still classed as non-formal while Western education is considered formal.²⁷

The UBE scheme provides for special groups such as nomads and migrants, girl-child and women, *almajiri*,²⁸ street children and disabled groups.²⁹ In other words UBE covers both formal and non-formal education. Its objective is to ensure schooling for children through the formal educational system, and also, for out of school children through complementary approaches. Included in this scheme is the non-formal Islamic educational system. The nomadic educational programme under the National Commission for Nomadic Education, (NCNE) was established to provide education for pastoral nomads and boat schools for migrant fishers.³⁰ EFA, through its goals in Article 7 of The Dakar Framework for Action, demonstrates the need to expand literacy beyond the borders of formal classrooms by embracing diverse delivery systems such as life skills learning, distance education, adult

²² *Ibid.*

²³ Gbadamosi, note 20, p.90.

²⁴ *Ibid.*

²⁵ Fafunwa, note 6, p.62.

²⁶ *Ibid.*

²⁷ S.15 UBE Act 2004.

²⁸ The word *Almajiri* emanated from an Arabic word *Almuhajir* meaning "immigrant". The name was given to qur'anic pupils, in most of the present day northern Nigeria, for they left their home towns usually to other places or to a popular teacher to obtain qur'anic education.

²⁹ S.15 UBE Act 2004

³⁰ Section 6 UBE Act,

education and traditional education.³¹ Since the pace, style, language and circumstances of learning will never be uniform for all, there should be room for diverse formal or less formal approaches, as long as they ensure sound learning and confer equivalent status of education.³²

4.3 Formal Education in Nigeria

Introduction to formal education in Nigeria was first initiated by Christian missionary societies in recognised church organisations in the mid-19th century.³³ The formal education, formerly termed western education, was founded on missionary based approach.³⁴ Its development in Southern Nigeria dates from the arrival of missionaries to the coastal areas in 1842, nineteen years before the establishment of the Colony of Lagos in 1861, although non-formal education had been in existence long before this.³⁵ The main focus of this study is on formal education and the reference to free and compulsory primary education in this thesis means formal primary education. The history of western education in Nigeria can be divided into three main phases: the period of Christian missionary activity; the period of the colonial government interest and the post-independence period.

4.3.1 Christian Mission Schools

Unmistakably linked to the implementation of formal education in Nigeria were the Christian missionaries, who realized that in order to spread the word of God they needed well-educated local assistants. In the Southern parts of Nigeria, Christian missionaries were the first to bring pre-statutory formal western education to the people. The period between 1842 and 1882 was marked by intensive missionary activities which started from the coastal areas and gradually spread to the hinterland. These areas later became the Colony and Protectorate of Southern Nigeria.³⁶

Evidently, there were minimal missionary activities in the Northern parts of Nigeria due to various reasons. First, formal education was equated with ‘*Nasaranci*’ or Christianity. Secondly, having divided the North into three educational zones in 1900 the Northern Nigerian Government refused to permit missionaries to establish schools in Muslim zones

³¹ UNESCO, ‘Education for all. Meeting our collective commitments’. *The Dakar Framework for Action: World Education Forum Dakar, Senegal 26-28 April 2000*, Paris UNESCO (2000)

³² *ibid*

³³ Taiwo, note 13, p.13.

³⁴ Fafunwa note 6, p.81.

³⁵ Majasan, J. ‘Traditional System of Education in Nigeria’, (1976) No119 -121: *Nigeria Magazine* pp. 23-29.at 23.

³⁶ Fafunwa, note 6 , p 85

with the possible exception of Wusasa C.M.S. settlement.³⁷ The missionaries were thus left with the middle belt part of Northern Nigeria.³⁸ Thirdly, before the arrival of the missionary in 1842, most of the schools in the Northern parts of Nigeria were Qur'anic schools where Islamic religious teaching was emphasised.³⁹ Fourthly, the Emirs had, during the period of pacification, secured pledges from the colonial government, which made it impossible to admit missions to the emirates without their consent. By 1939 there were 383 mission schools in the northern parts of Nigeria, compared to 3, 533 in the Southern parts of Nigeria.⁴⁰ The roots of this gap could be traced mainly to colonial education policies which restrained the rapid expansion of schooling in the northern territories because of concerns that this would lead to interference with the Islamic religion, which was predominant there.⁴¹

4.3.2 Education in the Pre-Independence Period (1884 -1960).

The British government colonised Nigeria in 1884. The period 1889-1902 saw the gradual development of the dual system in education, whereby the government, the missions and other religious organisations jointly provided education for children in the colony. The current primary education structure in Nigeria owes much to its colonial past. The first education ordinance⁴² was promulgated in 1882 when the colony of Lagos was still jointly administered with the Gold Coast colony. The Ordinance was the first legislation which affected Lagos and reflected the government's intention to control education. Some of the provisions included the constitution of a General Board of Education, the constitution, powers and duties of a local Board of Education which will advise the general board on the opening of new government schools. The Ordinance classified schools into (i) government schools which were maintained by public funds and (ii) assisted schools established by private persons and aided by public funds. There was also a provision which stipulated the admission of children from poor backgrounds into government and assisted schools. This group of poor children received education for free. The 1882 Ordinance was based on the

³⁷ Fawehinmi, G., *People's right to free education at all levels*, (Lagos: John West Publications, 1974), pp 46 & 47.

³⁸ *Ibid*

³⁹ Bittinger, D.W. *An Educational Experiment in Northern Nigeria in its Cultural Settings* (Doctoral Thesis) University of Pennsylvania, 1941 pp1-17.

⁴⁰ Fafunwa, note 6 p. 120

⁴¹ Ostrom, E., 'Crossing the great divide: co-production, synergy and development', Vol. 24, No 6, *World Development*, pp.1075

⁴² The Education Ordinance for the Gold Coast Colony, 1882.

British Education Act of 1844. The Ordinance was criticised for its ignoring of the African aspiration to develop the local language as a vehicle of education.⁴³

The 1887 Education Ordinance for the Colony of Lagos laid down certain principles which have become the foundation of education laws of Nigeria, although, the effect of this ordinance was, however limited to Lagos Colony.⁴⁴ The salient provisions of the 1887 Education Ordinance were: established system of grants-in-aid to schools (schools maintained by agencies other than government and were receiving grants from the government to help buy school equipment and pay teachers' salaries). Other provisions include; established teacher training institution, safeguarding of religious and racial freedom, and enabling the Governor to open, maintain and close non-government schools. It is noteworthy that freedom of religion was included in the Ordinance, which was significant since the Lagos population comprised of Christians, Muslims and pagans. In addition, this provision toned down the exclusively religious pattern of the mission schools. Religious worship and religious instructions given pupils at a mission school was in conformity with the wishes of their parents. Children not from Christian background were not compelled to take Christian religious subject. This must have been prompted by the claim that the missionaries' schools were established to convert the students to Christianity.

By the end of 1912, there were forty nine government primary schools and ninety one mission schools aided by the government with the enrolment of pupils in government and missionary schools at 35,512.⁴⁵ The government primary schools were maintained wholly or in part from public funds and arrangements was usually made whereby there was community involvement. For example, local chiefs or native courts accepted responsibility for erecting and maintaining school buildings and for paying an annual subscription which normally was about one-third of the cost of running the school.⁴⁶ The assisted missionary schools were given government grants and the deficit was met by school fees and church collections.⁴⁷ This indicates that there had been cost-sharing system between the government and the community in the funding of education since the colonial period.

⁴³ Taiwo, note 13, p. 12.

⁴⁴ Government Printer, *Annual Report of the Department of Education- 1st April 1951 to 31st March 1952*, (Lagos: Nigeria Government Printer, 1954), p.7.

⁴⁵ *Ibid*

⁴⁶ Phillipson, S.M.G. *Grant in Aid of Education in Nigeria: A Review with Recommendations*, (Lagos: Government Printer, 1948), pp 13- 14.

⁴⁷ *Ibid*, p 14

The passing of the 1916 Education Ordinance introduced a single education ordinance for the whole of Nigeria (Colony and Protectorate). A new Education Ordinance was enacted in May 1926 aimed primarily at regulating the standard and quality of schools in the Southern Provinces. The Education Ordinance of 1926 aimed to provide a better quality of education through increased direct government control and supervision, the co-operation with mission agencies by means of increased subsidies to schools and training institutions, and by an effort to improve the quality and status of teachers. The government stressed quality and the need for more qualified teachers. This pressure increased the standards for teacher qualifications in Nigeria. It is noteworthy that staffing of schools with trained teachers was the main substance of the ordinance. This shows the indispensability of qualified teachers in the delivery quality education. Schools were seen as producers of educated people for manning the government, teaching and commercial activities on which the progress of the country depended.

By 1929 there were in the North 116 schools conducted by Government with a total attendance of 3,549 pupils and 152 by the Missions of which only five were assisted.⁴⁸ In 1939, the number of schools in Southern Nigeria was 3,533 with enrolment number at 306,540 compared to Northern Nigeria where the number of schools was 599 and enrolment was 25,067.⁴⁹ The development notwithstanding, formal educational development in northern Nigeria presented one of the many educational inequalities and disparities of the system of education in the country since the colonial era. This was the beginning of the educational imbalance in Nigeria which still persists.

By 1949, there was phenomenal rapid spread of primary education throughout the country. In the Northern Region, enrolment was 62,088 and in the Southern Regions it was 956,691.⁵⁰ As the number of pupils increased more teachers were trained.⁵¹ Education was not free then and no definite steps had been taken towards the introduction of compulsory education all this time.

4.3.3 Legal Framework on Education during the Period of Transition to Independence

The period from 1950 to 1960 marked the period of the handing over of power by the British colonial administration to Nigerians. Under the 1954 Federal Constitution otherwise known as Lyttleton Constitution, Nigeria became a federation of three regions, each with its own

⁴⁸ Education Department, *Annual Report for the Year 1939*, (Lagos: Government Printer, 1939) p.12.

⁴⁹ *Ibid*, p.13

⁵⁰ Education Department, *Annual Report for the Year 1949* Annual Report.p13.

⁵¹ Education Department, *Annual Report for the 1951/52* (Lagos: Government Printer, 1951/52) pp 24& 25.

exclusive powers although the centre had certain extra powers which covered the regions. Lagos was excised from Western Region and it became a federal territory, governed directly by the federal government. There were three legislative lists: the Exclusive Legislative List, the Concurrent Legislative List and the Residual Legislative List. The Exclusive Legislative List was reserved for the central government and the Residual for the regional government. The central and the regional governments could legislate on subjects which were on the Concurrent List, provided the federal law prevailed in the event of conflict. Education other than higher education was a residual subject that was within the exclusive legislative competence of the regions. Primary and secondary educations were not mentioned on either the exclusive or the concurrent lists.⁵² The effect of this constitutional placement of education was that the Nigerian education system became a regional system of education. The regions enacted their respective Education Laws. The Western Region enacted its Education Law in 1954⁵³ while the Eastern and Northern Regions enacted their respective Education Laws in 1956.⁵⁴ The Federal Colony also enacted the Education (Lagos) Act in 1957.⁵⁵

The country's independence constitutional development made progress so that the Eastern and Western Regions gained regional self –government in 1957 and the Northern Region in 1959 and a target date for independence was fixed for 1 October 1960. In 1958 there were two and half million children in primary schools and 25,000 teachers in training.⁵⁶

4.4 Free Primary Education Initiatives in Nigeria

Free primary education programmes in Nigeria can be divided into three periods. In each period, significant political developments occurred. The first free primary initiative was introduced during the period of the preparation of the independence of the country- 1955-1959. After attainment of independence in 1960, between 1966 and 1978, there were various successive governments as a result of military coups and the laws were replaced by decrees with most laws that were in operation suspended. A second free primary education initiative was introduced in 1976 named the Universal Primary Education (UPE). The aim of the government during this period was to establish uniform education throughout the country.

⁵² The Exclusive and Concurrent Legislative Lists are in Parts I and II of The Schedule in the Constitution.

⁵³ Western Region Education Law, 1954, (No 6 of 1955).

⁵⁴ Eastern Region Education Law, 1956, (No 28 of 1956) and Northern Region Education Law, 1956 (No 17 of 1956).

⁵⁵ Education (Lagos) Act, No 26 of 1957.

⁵⁶ Federal Ministry of Education *Investment in Education: the Report of the Commission on Post School Certificate and Higher Education in Nigeria*, (Lagos: Federal Ministry of Education, 1960), p.4

The third initiative was in 1999 and was called the Universal Basic Education scheme (UBE). The aim was to achieve universal basic education for all children by 2015, in line with the MDG2. The UBE programme is wider as it makes provision of free education throughout the six year duration of primary education and the first three years of secondary education that is the junior secondary classes.

4.4.1 The First Period of Implementing Free Primary Education in Nigeria

The Richard Constitution of 1945 divided Nigeria into three regions: East, West and North, each with a regional assembly. The regional boundaries were coterminous with the three larger ethnic groups; East with Ibo, West with Yoruba and the North with Hausa-Fulani.⁵⁷ This period marked the beginning of tribal politics in Nigeria. The handing over of power by the British colonial administration to Nigerians was proceeding rapidly.⁵⁸ The era of representative government in Nigeria began in 1951.⁵⁹ The introduction of free primary education in the regions was used in political campaigns to win votes in the regions.

4.4.1.1 1955 Free Primary Education in the Western Region

The Action Group party, which was the dominant political party in the Western Region, under the leadership of Chief Obafemi Awolowo offered to provide free education to the public if elected to power.⁶⁰ To show the extent of their determination and commitment, the education minister emphasised that: 'Educational development in the region is imperative and urgent. It must be treated as a national emergency second only to war. It must move with the momentum of a revolution.'⁶¹ In 1954, enrolment was 457,000 and all these pupils were attending fee-paying primary schools in Western Region, but when the UPE scheme was launched in January 1955, enrolment rose to 811,000 and by 1958, more than one million children were enrolled and primary education was free.⁶²

The 1954 Education Law in Western Region was the legislative basis for the development of UPE in 1955. Salient provisions in the law were as follows: tuition and other services in public primary schools were to be free.⁶³ The 'other services' were not defined in the law. There was penalty of fine or imprisonment for any person who receives or obtains any fee

⁵⁷ Elias, T., *Nigeria: The Development of its Laws and Constitution*, (London: Steven & Sons, 1967), p. 166.

⁵⁸ *Ibid*, p.167.

⁵⁹ Ukueje, B.O., *Foundations of Education*, (Benin City: Ethiope Publishing Corporation, 1979), p.77.

⁶⁰ Fafunwa note 6 p.167

⁶¹ Western Region Debates (30 July 1952), pp.463-70.

¹³⁴ Taiwo, note 13, p.116.

⁶³ S.34 Cap 34 (1), Vol II Laws of Western Region of Nigeria, 1959

contrary to the provisions of the Law.⁶⁴ The law specified primary school age to be between the age of six and twelve years.⁶⁵ This has since been the age of primary school education in Nigeria. The law did not make education compulsory but just provided that parents had a duty to cause every child to receive education suitable to his age, ability and aptitude.⁶⁶ Regional expenditure on education was increased from £2.2 million (\$3.3m) in 1954 to £5.4 million (\$8.1m) in 1955, and nearly 90% was spent on primary education alone.⁶⁷ From 1955, through independence in 1960 till mid-1960s, the UPE in the Western region was near total in the Western Region. By 1960, the region had 6,500 primary schools with an enrolment of 1,124,788.⁶⁸ This represented more than 90 per cent of the children of school age.⁶⁹

4.4.1.2 1957 Free Primary Education in the Eastern Region

In 1957, the Eastern Region introduced its own UPE initiative. In the first year of the programme, primary school enrolment between 1956 and 1957 rose from 775,000 to 1,209,000 and to 1,378,403 in 1959.⁷⁰ The number of primary school teachers rose from 30,000 to 41,000 while the number of primary schools increased from 5,060 to 6,986.⁷¹ Confronted with the harsh realities of financial constraints after one year of operation the scheme collapsed.⁷² Fafunwa gave the reason for the unsuccessful implementation of the UPE scheme in Eastern Region to inadequate planning, that the government spent lesser time in planning than the Western Region.⁷³

4.4.1.3 Northern Region Attempt at Implementing Free Primary Education

The development of education in the North lagged behind that of the South. There was not much effort by the Northern government to give its children primary education.⁷⁴ The major reason for this was that most leaders in the Northern region at this time were reticent about western education as compared with the Islamic system. Also, the Northern government at that time was concerned with the promotion of adult literacy than with universal primary

⁶⁴ S34 (2) Laws of Western Region 1959

⁶⁵ S.31 Laws of Western Region 1959

⁶⁶ S.32 Laws of Western Region 1959

⁶⁷ Fawehinmi, G., note 37 p. 48.

⁶⁸ Report of the Commission appointed to review the educational system of Western Nigeria December 1960 to January 1961 p. 3

⁶⁹ Fafunwa note 6 p.169.

⁷⁰ Otoni, N., *Western Education and Nigerian Cultural Background*, (Oxford: OUP 1964), p117.

⁷¹ Fawehinmi, note 37 , p. 48.

⁷² Akinyemi, K. 'Trends in the Development of Primary Education in Nigeria in: S. Adesina, K. Akinyemi and K. Ajayi, (eds), *Nigerian Education: Trends and Issues* (University of Ife Press, Ile-Ife, 1983), p. 70.

⁷³ Fafunwa, note 6, p.171.

⁷⁴ Fawehinmi, note 37, p. 49.

education.⁷⁵ In 1957 when enrolment in the Eastern Region was 1,209,167, in the Western Region 982,755, in the North enrolment was 205,769. In 1960, enrolment in the Eastern region was 1,430,514, in the West, 1,124,788 and in the North it was 282,849.⁷⁶ There was educational imbalance between the North and the South which still persists.

4.4.1.4 The Implementation of the 1957 Free Primary Education in the Federal Territory of Lagos

The Federal territory of Lagos embarked on the free primary education scheme in 1957. The Education (Lagos) Ordinance 1957 was enacted. The Ordinance provided that; no fees must be charged in a maintained primary school,⁷⁷ (maintained primary school was a primary school in respect of which grants-in-aid were provided). The Ordinance defined the expression ‘fees’ to include any payment for tuition, books, uniforms or any other services.⁷⁸ Penalty was imposed on any one who received, obtained or made collection of fees contrary to the provision of the Ordinance.⁷⁹ Parents or pupils should not be ordered to purchase any article including uniforms, books and equipment for use in government maintained primary schools unless previous consent in writing had been granted by or on behalf of the Minister in charge of education.⁸⁰ Fees such as collection and charges made in schools were abolished and prohibited.⁸¹ No child must be forced to attend any religious instruction if his or her parents do not desire it.⁸² Compulsory attendance of pupil was not insisted upon and there was no sanction on parents whose children were not enrolled.⁸³ Although a child who had been absent without any reasonable cause for a continuous period of thirty days would not be recognised as a registered pupil and must seek re-admission if he or she wished to continue.⁸⁴ Once a parent sent a child to school it was regarded as their duty to keep the child there. It is submitted that introducing compulsory primary education at this period would have been a great step forward in the implementation of free primary education. Once education is free it should be made compulsory so that no child is prevented from attending school. Education laws of some of the other regions had similar provisions, simply stating that parents had a

⁷⁵ Fafunwa note 6, p. 175.

⁷⁶ *Ibid* p. 245.

⁷⁷ S.20. Cap 56 Education (Lagos) Ordinance. Laws of the Federation of Nigeria & Lagos 1958.

⁷⁸ S.20 (2) Cap56.

⁷⁹ S.20(3) Cap 56.

⁸⁰ S. 21(1) Cap 56, Education (Lagos) Ordinance1958

⁸¹ S. 61 (n) Cap 56, Education (Lagos) Ordinance1958

⁸² S.59 Cap 56, Education (Lagos) Ordinance1958

⁸³ S.18 Cap 56 Education (Lagos) Ordinance1958.

⁸⁴ S.17 Cap 56 Education (Lagos) Ordinance 1958.

duty to secure education of their children.⁸⁵ It is noteworthy that the Education Ordinance of 1958 contained some similar provisions with the 1966 ICESCR and the 1989 CRC. Nigeria could be acclaimed that its law at this period, which protects children's right to free primary education pre-dates the adoption of the two international treaties.

Parents were encouraged to write to the Education Officer to lodge complaints against school heads that were collecting any form of levies and refunds were made upon careful investigation.⁸⁶ The scheme emphasised transparency and accountability. These are elements in rights –based- approach programming The Government was careful to advertise UPE as a fee-free programme of education. Primary education was free but not compulsory; but despite primary education being optional, there was a surge in enrolment because it was free. This evidenced economic factor as a significant obstacle of education. Theoretically, abolishment of fees paved the way for all children in the Federal Territory of Lagos to be able to have primary school education. Indeed by 1958, primary school enrolment was 56,688 from 38,872 in 1956, with nearly fifty per cent of students continuing to secondary school.⁸⁷

4.4.1.5 Evaluation of the Free Primary Education Scheme of the Federal Territory Lagos and the Regions

Lagos had financial resources available, so the scheme was adequately financed. There was enough money to build new schools, refurbish the existing ones, and pay salaries that would attract teachers on account of the urban life of Lagos.⁸⁸ According to Taiwo's assessment of the UPE in Western Region, he attributed the success of the free universal primary education scheme in the Western Region to clear objectives, careful planning with the cooperation of all the education agencies and continual overseeing of the scheme.⁸⁹ In the Eastern Region, the UPE scheme of 1957 was modified later into three years of non-fee-paying in the first three years of primary school and another three years of fee paying from 1958.⁹⁰ From Adesina's assessment, the UPE programmes in the two regions were improperly planned and hurriedly executed, though comparatively, he noted that the Western region UPE succeeded marginally while the Eastern region UPE was a failure.⁹¹ Also from Ukeje's appraisal of the UPE scheme, the Western Region Free Primary Education Scheme experienced limited success,

⁸⁵ S.32 Cap 34, Laws of Western Region 1959.

⁸⁶ *Ibid.*

⁸⁷ Fafunwa, note 6 pp. 245& 246.

⁸⁸ Taiwo, note 13 p. 120.

⁸⁹ *Ibid*

⁹⁰ Fafunwa, note 6 p.171.

⁹¹ Adesina,S.,*The Development of Modern Education in Nigeria*,(Ibadan: Heinemann, 1977), p. 33.

and the Eastern Region equivalent was a failure.⁹² In the North, universal primary education was not implemented. A steady increase in enrolment into primary schools characterised the Northern Region, while in the Western and Eastern regions the increase was more significant. By 1958, primary school enrolment in the Eastern Region was 1,221,272 in the Western Region was 1, 037,388 and in the Northern Region 229,164.⁹³ While the Eastern and Western Regions were grappling with UPE implementation, the Northern Region emphasised religion over education.⁹⁴ These factors exacerbated the educational imbalance. The educational policies and programmes implemented by the different regional governments were carried over to independent Nigeria. On balance, these early efforts represented an awareness of the importance of universal education in the building of a modern society. In Nigeria, where independence was used to promote a new political, social and economic order, UPE was seen as indispensable. At independence, Nigeria looked forward to an educated electorate and citizenry in order to realise her objectives of freedom and prosperity.⁹⁵ The Free Primary Education programmes continued in the Western Region and Federal Territory of Lagos in 1955 and 1957 respectively, and remained in place until 1966.

4.5. Nationwide Universal Free Primary Education 1976 (UPE 1976)

In 1974, the Federal Government of Nigeria announced that it would be responsible for all primary education as from 1976, and attendance in primary schools would be compulsory by 1979.⁹⁶ Consequently, the Federal Military Government launched a nationwide program of universal primary education in 1976. Formal enrolment in primary schools leapt from 6.2 million students in 1975 to 8.1 million students in 1976 and continued to grow rapidly until 14.7 million students were formally enrolled in 1983.⁹⁷ This was the first time the universal primary education programme was applied to the whole country. The aim was that UPE will wipe out the imbalance in education between the Northern and Southern states.⁹⁸ A factor for initiating the free primary education was a desire to establish uniform education throughout the country so as to dismantle the patchwork of schools ran mostly by various religious

⁹² Ukeje, B.O., note 59, p.71.

⁹³ Fafunwa note 6 p.245.

⁹⁴ Akinyemi, K., 'Trends in the Development of Primary Education in Nigeria in: S. Adesina, K.Akinyemi and K. Ajayi, (eds), *Nigerian Education: Trends and Issues* (Ile-Ife: University of Ife Press, 1983), p.71.

⁹⁵ *Ibid.*

⁹⁶ *Ibid*

⁹⁷ Ayo, Dele *et al*, 'The Experience in Nigeria with decentralisation approaches to local delivery of primary education and primary health services', *Decentralisation: Finance & Management Project Report* (Burlington: VT:Associates in Rural Development, 1992), pp30-31.

⁹⁸ Nwangwu, N.A., *UPE: Issues, Prospects and Problems*, (Benin: Ethiope Publishing, 1995), p.197.

denominations.⁹⁹ The implementation of the free UPE scheme nationwide was based on the reasoning that every Nigerian child has an inalienable right to six years of primary education according to the obligation under the UDHR.¹⁰⁰ The introduction of the national UPE programme was aimed at improving access to school by providing free primary education for all children. There were over eight million children enrolled in 1976 (as against a projected 2.3 million).¹⁰¹

Between the end of the Nigerian civil war in 1970 and the installation of democratic government in 1979, Nigeria recorded an impressive economic performance due to the boom in crude petroleum oil revenue which accrued to the country.¹⁰² Due to the huge oil revenue accruing to the country, the Federal Government with effect from the 1976/77 school year made financial grants to each state in the country to enable them implement the free UPE scheme.¹⁰³ The national government provided full grants to finance education during 1976-78.¹⁰⁴ This encouraged access into primary schools by children from poor backgrounds in particular, who were previously under-represented in primary education because schooling was unaffordable for them.¹⁰⁵ Between 1976 and 1978, the Federal Government expenditure and resources allocated to education was second only to defence and exceeded the financial resources allocated to other social services like agriculture and healthcare.¹⁰⁶

4.5.1 Challenges of the UPE Programme

By 1981, the UPE programme had faced difficulties. While it was proposed that 2.3 million children would be enrolled in 1976, there were six million children enrolled. This figure doubled to 12 million in 1980. The influx of children following the implementation of UPE and the limited resource available to Government negatively affected the quality of primary education. In addition, there was a decline in oil revenue which forced the economy into recession.¹⁰⁷ Thus the UPE scheme launched nationwide in 1976 suffered a serious setback as the UPE capital and recurrent grants disbursed by the Federal Government to the States dwindled, due to the drastic cutback in Federal social service sector as a result of the severe

⁹⁹ Nwabueze, B.O., *Crises and Problems in Nigeria's Education*, (Ibadan: Spectrum Books, 1995), p.160.

¹⁰⁰ Ukeje note 59, p. 211.

¹⁰¹ Nwabueze, note 99, p.162.

¹⁰² Obasi, E. 'The Impact of Economic Recession on UPE in Nigeria', (2000) 20 *International Journal of Education Development* pp.189-207 at 191.

¹⁰³ *Ibid*

¹⁰⁴ Ostrom, note 41, p 1077.

¹⁰⁵ Obasi note 102, p.192.

¹⁰⁶ Nwangwu, note 98, p.198.

¹⁰⁷ Nwabueze note 99, p.165.

recession.¹⁰⁸ The national government demanded that state governments begin to shoulder part of the cost of education. The national government stopped funding primary education in 1981. The World Bank estimated that per-pupil expenditures dropped from \$92 in 1970, to \$60 in 1974; \$48 in 1981; and \$55 in 1983.¹⁰⁹ Because of the worsening economic conditions, Structural Adjustment Programme (SAP) was introduced in Nigeria in 1986, as prescribed by IMF and The World Bank to stimulate recovery of the ailing Nigerian economy as a pre-condition for obtaining loan facilities.¹¹⁰ The tight conditions imposed by the IMF in return for loans prevented the country from increasing public spending, making it difficult for the country to provide free education for all its children. A disturbing trend noted during the 1980s was a decline in enrolments and in the quality of education. This was, in part, attributed to the effects of financial austerity measures imposed along with the SAP of the IMF and the World Bank.¹¹¹ Nigeria was therefore unable to meet its obligation to fulfil the fundamental right of free, basic education for all children, despite its commitment to do so in international agreements such as the MDGs. Thus, due to tight budget constraints resulting from the IMF's policies, Nigeria like other countries in similar condition have no choice but to continue imposing some sort of charges in schools in order to raise resources.¹¹² This requirement contradicted state obligations under relevant international instruments that primary education should be free for all. Because public funding for education was insufficient to cover direct, indirect and opportunity costs of school, the definition *free* education was reduced to *fee-free*.¹¹³ The yardstick was no longer the elimination of *all* financial obstacles which keep children out of school which would have ensued from international human rights law and national constitutions.¹¹⁴ The indebtedness of the State to the international financial institutions such as the World Bank and IMF demanded liberalisation of trade as a debt relief strategy; this resulted in influencing the national educational policies.¹¹⁵ Katarina Tomasevski has pointed out that subjecting education to the

¹⁰⁸ Obasi, note 102, p.192

¹⁰⁹ World Bank, *Education in Sub-Saharan Africa: Policies for Adjustment, Revitalisation and Expansion*. (Washington D.C: The World Bank 1988).

¹¹⁰ Moja, Teboho, *Nigeria Education Sector Analysis: An Analytical Synthesis of Performance and Main Issues* (Washington D.C.: World Bank 2000), p 6.

¹¹¹ Reimers, F., & Tiburcio, L, *50 Years of Education; Educational Strategies for small Island States*, (Paris: UNESCO Publication, 1993), p.186.

¹¹² Webster, Thomas, *Globalisation of Educational Policies: Extent of External Influences on Contemporary UPE Policies in Papua New Guinea*, (Papua New Guinea : University of New Guinea Press, 2000) p.5.

¹¹³ Tomasevski, K. *The State of the Right to Education Worldwide Free or Fee: 2006 Global Report*, available at http://www.katarinatomasevski.com/images/Global_Report.pdf/ (accessed 17 June 2014), p.54.

¹¹⁴ *Ibid*

¹¹⁵ Tomasevski, 'Globalizing What: Education as a Human Right or as a Traded Service', (2005), 12 *Indiana Journal of Global Legal Studies*, 1-79 at p. 6.

free market relieves governments of the necessity to allocate to it significant part of their budget, the consequences is that only those who could afford to pay tuition fee have access to schooling.¹¹⁶

Part of a broader structural adjustment process, was the reduction of government recurrent expenditure being devoted to education.¹¹⁷ There was significant drop in primary school attendance in the 1980s which was attributed to the implementation of stabilisation and adjustment policies of SAP at the prompting from the IMF and the World Bank.¹¹⁸ In 1986, the Nigerian government on the recommendation of the IMF introduced an educational cost-sharing scheme, whereby parents were obligated to contribute to non-salary school costs.¹¹⁹ Since most of the children are from poor households, gross enrolment dropped from 112% in 1984 to 83% in 1989.¹²⁰ According to Obasi, this makes the SAP a formidable obstacle to the achievement of UPE.¹²¹ Funding responsibilities of primary education during the period of economic crisis were transferred in a top-down approach, from one level of government to another, as well as to families, to help subsidize education through fee payments.¹²²

During the economic crisis of the 1980s, the administration and funding of the universal primary education scheme was decentralised. Federal and State governments and Local Government Authorities (LGAs) provided funding for education at the primary school level. Schools were subsidized through additional funds contributed by communities to their local schools through Parent-Teacher Associations (PTAs), Schools, Councils, and Community-based Organisations. These funds were used for infrastructure construction, maintenance, and supply of basic equipment.¹²³ The total public funds allocated to primary education were halved in the period between 1994 and 1996.¹²⁴ By 1995 the value of the Naira had fallen from a US\$ ratio of 1:1 and in 1985 to one of 85:1.¹²⁵ State allocations to education in the same period decreased. The UPE became an expensive programme to sustain. In an attempt

¹¹⁶ Tomasevski, *Education Denied: Costs and Remedies*, (London: Zed Books, 2003), p.93.

¹¹⁷ Mustapha, A.R, 'Structural Adjustment and Agrarian Change in Nigeria', in: Olukoshi, A.O. (ed.) *The Politics of Structural Adjustment in Nigeria*, (, London: Currey 1993) p.115.

¹¹⁸ Action Aid International, *Contradicting Commitments How the Achievement of Education for All is Being Undermined by the International Monetary Fund*, (2005) p.16 available at; http://www.actionaid.org/sites/files/actionaid/aaconf_contradictions_final2.pdf accessed 13 March 2013.

¹¹⁹ Obasi E, 'Structural Adjustment and Gender Access to Education in Nigeria', (1997) Vol. 9 Issue 2 *Gender and Education*, pp. 161-178 at 173.

¹²⁰ World Bank school enrolment/ primary (% gross), available at; <http://www.data.worldbank.org/indicators/SE.PR.M.ENRR> accessed on 13 November 2013.

¹²¹ Obasi, 'The Impact of Economic Recession on UPE in Nigeria', note 102, at 191.

¹²² UNESCO, *State of Education in Nigeria*, (Abuja: UNESCO Abuja Office 2000), p.10.

¹²³ *Ibid* p.15

¹²⁴ CBN Statistical Bulletin

¹²⁵ *Ibid*

to offset the effects of the Federal budget cuts which many of the states could not bear because of their weak financial position some of the states like Imo state instantly introduced cost-recovery and containment measures in education which included the reintroduction of fees in primary education from the 1981/82 school year.¹²⁶ The crisis left existing facilities inadequately maintained and retarded progress in building new facilities and the school environment was therefore not conducive to learning.¹²⁷ The classrooms were overcrowded and in some instances schools operated with teacher-pupil ratios of 1:76,¹²⁸ whereas, the National Policy on Education prescribed that the teacher-pupil ratio should be 1:40.¹²⁹ The quality of public education suffered in consequence, with the justification that public funding was scarce. The morale amongst teachers was low due to the basic conditions of service such as the work environment, low and late salaries.¹³⁰ There was a significant decrease in completion rate as students were forced to drop out.¹³¹ Formal enrolment then fell for four years in a row (1984-1987), from 15.5 million until it reached 11.5 million in 1987.¹³² The average dropout rate at the primary school level between the period 1986 and 1992 was estimated to be 43.2%.¹³³ The importance attached to quality education is expressed in the *Recommendation Concerning Status of Teachers* (1974) which provides that “as an educational objective, no State should be satisfied with mere quantity, but should seek also to improve quality”. Primary education must comply with “minimum educational standards” to be established and effectively monitored by States parties.¹³⁴ States parties are obliged to ensure that educational standards in public schools do not fall behind those in private school.

4.5.2 Shortfalls of the 1976 UPE Scheme

Generally, the financial planning of the UPE programme encountered four major problems. First, the enrolment projections were well below the actual enrolments, this involved more expenditure than was planned. Second, the late '70s was the period of oil boom so there was salary increase for all workers including teachers. The consequences of over-dependence on petroleum as the main source of revenue had far-reaching adverse effect during the recession

¹²⁶ Obasi note 102, p. 191.

¹²⁷ UNESCO, *State of Education in Nigeria*, note 122, p. 35.

¹²⁸ Nwangwu note 98, p.102.

¹²⁹ National Policy on Education 2004.

¹³⁰ Federal Ministry of Education, *Education Sector Status Report 2003*, (Abuja: Federal Ministry of Education, 2003), p .34.

¹³¹ Moja, note 110, p.39.

¹³² *Ibid*

¹³³ *Ibid*

¹³⁴ CESCR *General Comment 13*, para.54.

of the '80s and it became difficult sustaining the salary increase.¹³⁵ Third, until the launch of UPE programme, state governments had been providing all of the funding for primary education. However as a Federal Government initiative, the Federal Government assumed full financial responsibility for the scheme in its various ramifications.¹³⁶ Fourthly, another factor that inhibited the success of the UPE programme had been lack of continuity; there were series of coups and counter coups during this period under various military dictators. The practise of a military regime is to make decisions centrally, whereas the successful implementation and delivery of UPE required joint involvement by several key actors across sectors to be efficient. The education administrations did not allow participation nor did they consult with seasoned administrators.¹³⁷ All policy switches appeared in a top-down proclamation by the national government, acting alone.¹³⁸ The 1979 Constitution put primary education back in the residual list.¹³⁹ In addition, the relationship of the military government with the western nations was not cordial and this affected the level of assistance given.¹⁴⁰ The collection of all these errors affected the sustenance of the national UPE programme of 1976.

4.6. Universal Basic Education (UBE) 1999

In 1999, it was estimated that there were 19.5 million primary school age children in Nigeria out of which 15.7 million were reported to be in school and the remaining 3.8 million were on the streets.¹⁴¹ Thus when the new administration of civilian government got into power in 1999, the education system was on the verge of collapse. To address the problem, the government launched the UBE Scheme. This was in compliance with the Declaration of the World Conference on Education for All (EFA) at Jomtien, Thailand in 1990, which stated clearly in Article 1 that every person - child, youth or adult - shall be able to benefit from educational opportunities designed to meet their basic needs.¹⁴² The declaration was reaffirmed at the World Education Summit of 2000, where governments and international organisations gave their commitment to ensure that by 2015, '...all children have access to

¹³⁵ Ndagi, J.O., 'Financing of Education in Nigeria under Military Rule (1968-1978)', In: S. Adesina, K. Akinyemi and K. Ajayi, (eds), *Nigerian Education: Trends and Issues* (Ile-Ife: University of Ife Press, 1983) p.196

¹³⁶ Hinchliffe, K. *Public Expenditures on Education in Nigeria: Issues, Estimates and Some Implications*, The World Bank, Africa Region Human Development Working Paper Series, 2002, p.23.

¹³⁷ *Ibid*

¹³⁸ Ostrom, note 41, p.1077.

¹³⁹ *Ibid*

¹⁴⁰ Hinchliffe note 136, p. 6.

¹⁴¹ Moja, note 110, p.6

¹⁴² The Dakar Framework for Action: Education for All, Adopted by the World Education Forum Dakar, Senegal, 26-28 April 2000. www.unesdoc.unesco.org/ accessed 3 July 2013.

complete free and compulsory primary education of good quality...'¹⁴³ This is echoed by the second MDG adopted by the UN General Assembly the same year, which aimed to ensure that by 2015, '... children everywhere boys and girls alike will be able to complete a full course of primary schooling...'¹⁴⁴

UBE came as a replacement for Nigeria's Universal Primary Education scheme.¹⁴⁵ The launch of UBE in 1999 was aimed at providing free universal basic education for all, to enable all citizens to acquire appropriate levels of literacy, numeracy, communicative, manipulative and life skills. The primary target of the UBE educational policy was to ensure that every Nigerian child acquired a minimum of nine years basic education.¹⁴⁶ UBE is broader than UPE which focused only on providing educational opportunities to primary school age children. UBE stresses the inclusion of girls and women and a number of underserved groups such as the poor, street and working children, rural and remote populations, nomads, migrant workers, indigenous peoples, minorities, refugees, and the disabled.¹⁴⁷ The formal educational system is only one of six components included in the UBE scheme.¹⁴⁸ Etuk *et al* pointed out that given the unstable and consequently unreliable socioeconomic realities in Nigeria, it is doubtful how far the UBE programme can go in meeting its target and achieving its set objectives.¹⁴⁹ UBE not only provides free basic education, but also makes it compulsory. The enabling law of UBE has prescribed punishment for parents and guardians who keep their children and wards from school. Such offence is punishable by imprisonment or payment of fine.¹⁵⁰ UBE is meant to be free and compulsory for every Nigerian child of school age. It sought to drastically reduce school drop-out rate and improve quality and efficiency.

¹⁴³ <http://www.un-documents.net/dakarfa.htm> accessed 3 July 2013.

¹⁴⁴ <http://www.un.org/millenniumgoals/> accessed 03/07/2013

¹⁴⁵ In November 1999, the Federal Government under the leadership of President Olusegun Obasanjo launched the Universal Basic Education (UBE) Scheme for the nation. This was re-launching of a similar programme to UPE

¹⁴⁶ Etuk, G.R *et al* 'Nigeria's Universal Basic Education (U.B.E.) Policy: A Sociological Analysis', (2012) 7 (2) *July American International Journal of Contemporary Research*, pp.179 – 183, at 180.

¹⁴⁷ Tsafe,,A.K., 'A critical analysis of universal basic education on its implementation so far' (2013) 2(1) *Scientific Journal of Pure and Applied Sciences* 23.

¹⁴⁸ Nigeria, UBE Planning and Implementation Guideline, 2000. See also, Unagha, A.O., *Implementing Universal Basic Education (UBE) through the Strategic Provision of School Library Services*

¹⁴⁹ Etuk, *et al* , note 146, p 181.

¹⁵⁰ UBE Act 2004

The UBE Act was enacted on 26 May 2004.¹⁵¹ This was to give legal backing to the UBE program. The Act provides for the establishment of The Universal Basic Education Commission (UBEC)¹⁵² in order to make the universal basic education to be operational throughout the country. The financing of UBE would be from Federal Government block grant; funds or contributions in form of Federal guaranteed credits; and local and international donor grants.¹⁵³

4.6.1 Various Initiatives in the Achievements of the UBE Scheme

The Government increased the share of education in budget spending from 6.4% in 2010 to 7.5% in 2011 in order to improve access to education, especially Universal Basic Education.¹⁵⁴ The Almajiri Education Programme was launched in Sokoto as part of the strategy to reduce the number of Out-of-school children. The programme is aimed at mainstreaming the Almajiri System into Basic Education, thereby providing them with the opportunity to develop skills that will make them contribute to national development. Textbooks in eleven (11) subjects have been produced for use in the schools nationwide.¹⁵⁵

To boost girl-child Education nationwide, tripartite partnership programme and funding between the Federal and State Governments and UNICEF had been launched since 2011 and has commenced disbursement of funds for the training of female teachers to States Universal Primary Education Boards. Sokoto state, one of the states with poor girl-child education record, trains 800 female teachers (2012-13) with N49.5m granted to 224 school-based management committees as critical components in achieving UBE for all.¹⁵⁶

The Nigerian Statistical System now enjoys availability of gender statistics in recent times. Data producers now create sex disaggregated statistics in population, and education. Also in many agencies, gender statistics in some hitherto unavailable areas are now available. The improved data situation has been enhanced by a number of developments including agencies such as National Bureau of Statistics' (NBS) efforts at promoting gender statistics, the role of

¹⁵¹ Though the implementation process of the UBE programme has been on since 1999, but progress was hampered by lack of an enabling law to execute certain aspects of the programme. There were only guidelines on implementation for the Universal Basic Education Programme (1999) which were to serve as guidelines for implementation. UBE Bill was signed into law in 2004.

¹⁵² S. 7(1) UBE Act 2004

¹⁵³ S.11 UBE Act

¹⁵⁴ Federal Government Allocation to Education Sector (1999-2013) culled from: Federal Republic of Nigeria, *Fifth Periodic Report 2011-2014 on the implementation of the African Charter on Human and Peoples' Rights* available at www.statereport5.Nigeria.2013_eng1 [accessed 14 July 2014]

¹⁵⁵ *Ibid* p.37.

¹⁵⁶ *Ibid*

Women Affairs Ministry and development of the National Gender Policy as well as contribution of international organisations such as UNICEF, UNDP and UNIFEM. Previously, the non-availability of reliable and comprehensive sex -disaggregated statistics had led to exclusion of gender issues in the formulation and implementation process of policies by the government. Through the Education Data Bank with the development of an Education Management Information System (EMIS), a baseline survey has been completed for 1999 to 2002 whereas this was not completed in previous years.¹⁵⁷ The Baseline Survey is to update the national education data collection system and more accurately supply information on the education statistics all the time.

4.6.2 Challenges and Obstacles to the Effective Implementation of UBE

The critical challenge in the Education sector is that of adequacy of funding to address to numerous problems facing tertiary, secondary and primary education, particularly adequate facilities to cater for the size of the students and pupils in the sector. This requires incremental budgetary allocation from the current 8.7% of the annual budget to the UNESCO standard of 26%. This low level of fiscal allocation to the sector which is below the UNESCO threshold of the total budget certainly affects the implementation of government policy on education in the country.

Despite the responsibility of Federal government block grant of 2% of its consolidated Revenue Fund for UBE financing,¹⁵⁸ disbursement of the funds has remained an issue.¹⁵⁹ The Global Monitoring Report indicated that from inception of UBEC in 2005, every state of the federation including the Federal Capital Territory got the allocation of N6.41billion but unfortunately, not many of states have accessed this fund.¹⁶⁰ It was observed that some states failed to receive any money from the fund because of problems ranging from inadequate policy coordination, complex bureaucratic procedures and the matching grants conditions stipulated under the UBE Act.¹⁶¹ According to the report, only seven states have accessed this

¹⁵⁷ Education Sector Report 2003, note 130 p.45.

¹⁵⁸ S.11 UBE Act 2004.

¹⁵⁹ 'States and abandoned N48bn UBE funds', www.blueprint.ng/2014/02/05/states-and-abandoned-n48bn-ube-funds/ accessed 23March 2014.

¹⁶⁰ UNESCO- EFA. *Global Monitoring Report*. (Paris: UNESCO, 2009).

¹⁶¹ Samer Al- Samarra, Funding fix is good news for Nigerian children, posted on World Education Blog on 5 May 2010 <http://efareport.wordpress.com/2010/05/05/funding-fix-is-good-news-for-Nigerian-children> accessed on 24 January 2013.

fund up-to-date. These are: Adamawa, Anambra, Kaduna, Katsina, Sokoto and Zamfara states.¹⁶²

Anaba is of the opinion that it would make more sense if the Federal government made it easier for States, by taking out the ‘matching’ from these grants and simply made it grants available for use which should be properly monitored by UBEC through their state agencies.¹⁶³ The refusal by states to access this fund is gradually ‘killing’ basic education in the affected states.¹⁶⁴ She argued that if the Federal Government really cared as much as they would like the populace to believe, it would find a way of providing these funds to these states and making them account for them without requiring the matching funds.¹⁶⁵ If the reason for asking for matching grants is to ensure that there is a minimum amount dedicated to funding education in each state, it should be possible to go about this through some other form of legislation instead of tying the fund to the condition.¹⁶⁶

Study revealed that not all funds allocated for the UBE programme are used for the intended purposes due to wasteful spending and high level of corruption by key implementing agencies.¹⁶⁷ The 2009 Global Monitoring Report¹⁶⁸ showed that the UBEC intervention fund only distributed 60% of the \$750 million allocated funds between 2005 and 2008 to the various states.¹⁶⁹ It was also revealed that corruption is making the implementation of UBE untenable to a large extent.¹⁷⁰ In 2006, an NGO, Socio-Economic Rights and Accountability Project (SERAP) received information from whistle-blowers alleging massive corruption by UBEC. SERAP undertook initial investigations in 2006, and submitted a petition to Nigeria’s Independent Corrupt Practices Commission (ICPC) in January 2007 to undertake a formal investigation.¹⁷¹ The ICPC investigation concluded in October 2007 that N3.3 billion (US\$21

¹⁶² Kuni Tyessi, *Nigeria: States Abandon N48 Billion UBE Funds*, 29 January 2014, www.allafrica.com/stories/201401290122/html accessed 23 March 2014

¹⁶³ Anaba, Abigail: ‘UBE funds: Dear Wike, we are tired of the bickering’, *The Scoop*, January 28, 2014, www.thescoopng.com/Abigail-anaba-ube-funds-dear-wike-we-tired-of-the-bickering/ accessed on 23 March 2014.

¹⁶⁴ FG blasts states for not accessing N41 billion UBE fund. <http://www.vanguardngr.com/2014/01/fg-blasts-states-accessing-n41-billion-ube-fund/#sthash.r1NsjRHR.dpuf/>

¹⁶⁵ *Ibid*

¹⁶⁶ *Ibid*

¹⁶⁷ Ejere E. I, ‘An examination of critical problem associated with the implementation of UBE in Nigeria,’ Vol 4 No1, February 2011 *International Education Studies*, available at www.ccsenet.org/ies accessed 24 January 2013.

¹⁶⁸ UNESCO- EFA. *Global Monitoring Report 2009* (Paris: UNESCO 2009).

²²⁴ Samer Al- Samarrai, note 161.

¹⁷⁰ *Ibid*

¹⁷¹ The Nation Newspaper, ‘Government officials divert N3b UBE funds in 20 states’, 5 March 2008, available at http://www.thenationonlineng.net/archive2/tblnews_Detail.php?id=46398/ [accessed 6 January 2013].

million) had been lost in 2005 and 2006 to the illegal and unauthorised utilization of funds. SERAP estimated that, as a direct consequence, over five million Nigerian children lack access to primary education.¹⁷² The ICPC recommended review of the processes and procedures of the UBEC.¹⁷³

The findings of the ICPC report gave SERAP the impetus to file a right to education case before the Economic Community of West African States (ECOWAS) court in Abuja, arguing that the corruption in the UBEC amounted to a denial of the right to free, quality and compulsory education for Nigerian children as provided for by Article 17 of the ACHPR. The Community Court of Justice (CCJ) of the Economic Community of West African States noted that there was prima facie evidence of embezzlement of funds on the basis of the reports of the ICPC. It stated that, while steps should be taken to recover funds and/or prosecute the suspects, the Nigerian government should provide the funds necessary to cover the shortfall in order to avoid denying any of its people the right to education. The court also asked the government to ensure that the right to education was not undermined by corruption. The CCJ held that the UBEC has the responsibility of ensuring that funds disbursed for basic education are used properly for this purpose.¹⁷⁴

According to Margaret Ya'u, programme manager for the Civil Society Action Coalition on Education for All (CSACEFA), despite declarations that the UBE is meant to be free and compulsory, many children are not in school because of hidden costs. According to her; "...we've been going around communities and discovered that just N50 (\$0.25) or even less can prevent a family from sending a child to school."¹⁷⁵ Given that about 70% of Nigerians are living below the poverty line, defined as living on less than US \$ 1 per day,¹⁷⁶ it should not come as a surprise that no matter how little the costs associated with education may be, there will be parents who cannot afford it, and such can keep pupils out of school. This is having adverse effect on enrolment and retention rates.

¹⁷² *Ibid*

¹⁷³ Mumuni, Adetokunbo & Sweeney, Gareth, 'Public interest litigation for the right to education: The *SERAP v. Nigeria* case', in: *Global Corruption Report :Education Transparency International, 2013* p. 307.

¹⁷⁴ *SERAP V Federal Government of Nigeria & UBEC*, ECW/CCJ/APP/0808, available at; <http://www.escri-net.org/docs/i/1143047>

¹⁷⁵ The Nation Newspaper, October, 16, 2008, p12.

¹⁷⁶ Human Development Report, 2009

4.7 Collaborations with International Development Partners in the Implementation of UBE

Article 4 CRC provides that all measures for realising economic, social and cultural rights must be taken to the maximum extent of available resources of State Parties and ‘where needed within the framework of international cooperation.’

UBEC was mandated under Section 11(1) (c) of the UBE Act 2004 to facilitate and ensure smooth collaboration with International Development Partners (IDPs) and NGOs to boost basic education delivery in Nigeria. In keeping with this mandate, UBEC has attracted financial and technical support from different IDPs. Japan International Cooperation Agency (JICA) undertook the project for the construction of classrooms in Niger, Plateau, Kaduna, Kano, Oyo, Adamawa, Gombe, Ebonyi and Borno States.¹⁷⁷ Similarly, Korea International Cooperation Agency (KOICA) built classrooms in Kogi, Gombe and Adamawa states.¹⁷⁸ UNESCO expended \$1.2 million in 2000-2003 to support Education Sector Analysis and the DFID funded Community Education Project in 1997-2002 costing \$5million.¹⁷⁹ Currently, DFID supports ten of Nigeria’s 36 States through two programmes: the UNICEF-led Girls’ Education Programme (GEP), funded from 2005 to 2019; and the Education Sector Support Programme in Nigeria (ESSPIN), delivered by a Cambridge Education-led consortium during 2008-2014. DFID has spent £102 million to date, with a further £126 million committed to 2019. In sum, the efforts of the IDPs in the implementation of UBE programme are significant, mostly on technical assistance, capacity building, experimental initiative and research. The contributions of the International donors for free primary education in Nigeria are included in the appendix at the end of the thesis.

4.8 Right to Free and Compulsory Primary Education of Disadvantaged Children

In Nigeria, even though the Constitution incorporates a provision of non-discrimination,¹⁸⁰ the Committee of the CRC, in its combined third and fourth reports’ concluding observations on Nigeria in 2010,¹⁸¹ raised concerns that *de facto* discrimination against children was still prevalent in Nigeria and is widely tolerated in the State party. Of particular concern was vis-

¹⁷⁷ Tsafe note 147, p.25.

¹⁷⁸ *Ibid* p.26.

¹⁷⁹ DFID’s Education Programmes in Nigeria, Report 16 – November 2012 available at; <http://icaei.independent.gov.uk/wp-content/uploads/2010/11/ICAI-Nigeria-Education-report.pdf> [accessed 13 March 2013], p.4.

¹⁸⁰ Section 42 (2) 1990 Constitution of Nigeria.

¹⁸¹ Committee on the Rights of the Child Concluding observation: *Nigeria CRC/C/NGA/CO/3-4*, para. 28

à-vis the girl child, children with disabilities, and street children. The Committee requested the State party to provide more information in its next periodic report on measures taken to give practical effect to the principle of non-discrimination in relation to these groups.

Education is critical to the future of all children, but especially to those who are vulnerable, that is; children such as the orphaned, street children, girl-child, children living in conflict areas and children who belong to sections of a community, such as from indigenous or minority groups or lower status. These groups of children are often discriminated against and are more likely to drop out of school. Two main issues are examined in this section, one is the need to categorise vulnerable children into different groups and examine their plights in having access to free and compulsory primary education. Secondly, to analyse the protection of vulnerable groups and the use of international human rights instruments, their relation to national law and practice for improving their access to free and compulsory primary education.

4.8.1 The Categories of Vulnerable Children

Orphans- Natural disasters, conflicts or the impact of disease including HIV, AIDS, can cause a child to be orphaned. In Nigeria, HIV and AIDS is prevalent, therefore if a parent falls ill due to HIV or AIDS related illnesses, the child may have to drop out of school to care for family members. The phenomenon of child-headed households is also associated with the HIV, AIDS epidemic as orphaned children work to care for younger siblings. During these unpredictable events, child labour may be resorted to as a coping mechanism. Three major reasons are identified as hindrances for orphans continuing lack of access to schooling; first, there are the additional costs of education, even when school fees are abolished, money must still be found to pay for uniforms, books, and these are not affordable to these children. Secondly, orphans may be unable to attend school full-time due to the need to earn a living, or care for siblings. Thirdly, due to lack of parental direction, orphans can easily reject spending time in school. Education will give children in this category hope for life and work, and will be a strong protector against HIV to which these children may be particularly susceptible. It is important that these children receive education because without the protective and preventive enlightenment schooling offers, children of parents affected by HIV and AIDS are significantly more likely to become infected themselves.

Street children- They are commonly perceived as young children living on the streets of large cities in developing countries, often begging.¹⁸² It comprises children who happen to be on the streets, those who work on the streets to complement the family income, those who beg with an older family member, children who run away from home temporarily and children who have been abandoned or who have abandoned their families. Apart from the physical hazards, they also miss schooling. Particularly important to street children as to any other poor and marginalized people, education can be a way out of poverty, as it gives these children better chances in finding decent employment, helps them to understand the reasons of their condition, and to discover their own worth and capabilities.

Education is especially important for street children, as it is a tool for change, a way out of poverty and a way to self-discovery and personal achievement to have access to education. This group of children not only face the problem of access to education but also experience discrimination against them at school. Their survival needs and independent way of life make traditional teaching methods and subjects incompatible with and irrelevant to their daily lives. However, socially and economically marginalized groups experience great difficulty in receiving education. Teachers or other students might treat street children disrespectfully, thus contributing to their eventual drop out to escape constant disregard, discouragement or punishment. Most cannot cope with strict discipline after experiencing freedom on the streets. Other ways these children are indirectly denied access to education is through hidden fees, for example by making students buy their own school uniform and supplies, as well as contributing to the renovation of school buildings.

However, street education usually does not match public or private schools providing formal education. In Nigeria included in this group are the *Almajaris*. Thus, the Act on Compulsory Free Universal Basic Education of the Republic of Nigeria (2004) provides for basic education. The Act makes a distinction between Basic Education and Universal Basic Education. It defines Basic education as comprising ‘early childhood care and education and nine years of formal schooling’. Universal basic education is defined in the Act as ‘early childhood care and education, nine years of formal schooling, literacy and non-formal education, skills acquisition programmes and the education of special groups such as nomadic and migrants, girl-child and women, *almajiri*, street children and disabled

¹⁸² Adepaju, T., ‘Determinants of Participation in Literacy Programmes’, (2004) Vol. 1(2), *International Journal of Literacy Education*, p.21.

groups'.¹⁸³ In the Act, two types of non-formal education are categorised in the Nigeria Education Sector Support Programme; non-formal schools, which offer the formal school curriculum, and non-formal education programme, which offer flexible learning schedules and diverse curricula. The non-formal educations are not described in this thesis. In its Concluding Observations and Recommendation (4th Country Report)¹⁸⁴ it was recommended that the state is to ensure the implementation of the 2010 Strategic Plan of Action and Operational Guidelines complementing the Almajiri Education Programme and Work Plan for the integration of 400,000 Almajiri Children.¹⁸⁵ Nigeria in its Responsive Mitigation Effort¹⁸⁶ states that the Almajiri Education Programme has been launched in Sokoto as part of the strategy to reduce the number of Out-of-school children. The programme is aimed at mainstreaming the Almajiri System into Basic Education, thereby providing the Almajaris with the opportunity to develop skills that will make them contribute to national development. In implementing the UBE Act it is essential to ensure that all school age going children are banished from the streets to the classrooms to study.

Children with disabilities- Children with disabilities are one of the many groups of children still not enrolled in primary education in developing countries including Nigeria. Disability is still overwhelmingly viewed as a social welfare issue. As a result, disabled people are seen as passive victims requiring charitable assistance, and disability is considered a 'special' issue, isolated from mainstream development. Children in Nigeria face several challenges in having access to education, ranging from inadequate educational facilities for children with special needs, and most of the teachers are trained in special education. Segregation in separate special schools of pupils with special educational needs or poor attempts at -integration has left disabled children and students not achieving their potential.¹⁸⁷ The alternative is to engage in the transformational process in schools, that is the development of inclusive education. Inclusive education can be interpreted as the philosophy and practice for

¹⁸³ Article 15 (1) UBE Act 2004, see also Country Report: The Development of Education in Nigeria - UNESCO Forty-Seventh Session of the International Conference on Education (ICE), Geneva, 8-11 September 2004, pp. 58-75.

¹⁸⁴ Nigeria's 5th Periodic Country Report: - 2011-2014 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria June 2014. Section 2.1 para 69 available at; http://www.achpr.org/files/sessions/56th/state-reports/5th-2011-2014/staterep5_nigeria_2013_eng.pdf [accessed 20 June 2015].

¹⁸⁵ *Ibid*

¹⁸⁶ *Ibid*

¹⁸⁷ Rieser, Richard, Implementing Inclusive Education A Commonwealth Guide to Implementing Article 24 of the UN Convention on the Rights of Persons with Disabilities, (London: Commonwealth Secretariat 2008), p. 16.

educating students with disabilities in general education settings.¹⁸⁸ The practice is based on the notion that every child should be an equally valued member of the school culture. In other words, children with disabilities should benefit from learning in a regular classroom, while their peers without disabilities gain from being exposed to children with diverse characteristics, talents and temperaments.¹⁸⁹ There is gap in school participation between children with and without disabilities. Children with disabilities are often discriminated against within the Nigerian educational context. The following problems exist in Nigeria as regards inclusive education; shortage of trained staff and resource teachers at primary, secondary and tertiary levels; no clear guidelines on inclusive education, no concrete commitments in terms of budget allocation in the country for inclusive education; lack of awareness and education facilities for people with disabilities in rural areas, and inaccessible schools and public transport.¹⁹⁰ In most cases, these children are not integrated into the state educational systems because of their disabilities. UN Convention on the Rights of Persons with Disabilities¹⁹¹ requires that:

States Parties. . .shall ensure that. . .persons with disabilities can access an inclusive, quality and free primary education on an equal basis with others in the communities in which they live. . .receive the support required within the general education system to facilitate their effective education. . .are able to access tertiary education, vocational training, adult education and lifelong learning. . .¹⁹²

In relation to disability and education, rights based approach and equity have been both framed and strengthened by a number of international declarations, including the CRC.¹⁹³ Inclusive education ensures the presence, participation and achievement of all students in schooling. Inclusive education acknowledges that all children can learn and respects differences in children. To enable children with disabilities to fulfil their potential, provision must be made for them through the provision of special teaching and learning materials. States are directed to recognise ‘the special need’ of children with disabilities including a duty placed on States Parties to the CRC to ensure that children with disabilities have

¹⁸⁸ Bryant, D. P., Smith, D. D., & Bryant, B. R. *Teaching Students with Special Needs in Inclusive Classrooms*, (Boston, MA: Pearson Education Inc, 2008).

¹⁸⁹ Ajuwon, Paul, ‘Inclusive Education for Students with Disabilities in Nigeria: Benefits, Challenges and Policy Implications’, (2008) v23 n3 *International Journal of Special Education*, p11-16.

¹⁹⁰ *Ibid*

¹⁹¹ UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106, available at: <http://www.refworld.org/docid/45f973632.html> [accessed 5 September 2014]

¹⁹² Article 24 Convention on the Rights of Persons with Disabilities

¹⁹³ Article 29 (1) CRC, see also CRC *General Comment No1 (2001) The Aims of Education*, para 10.

effective access to education and training.¹⁹⁴ Such education should, according to UNESCO, be suited to the individual needs of children, regardless of the degree of disability or special need.¹⁹⁵ Education must be accessible to all, especially the most vulnerable groups, in law and without discrimination. All children have the right to education.

Girl-child- Non-discriminatory education benefits both girls and boys and thus ultimately contributes to more equal relationships between women and men. Equality of access to and attainment of educational qualifications is necessary if more women are to become agents of change. Literacy of women is an important key to improving health, nutrition and education in the family and to empowering women to participate in decision-making in society.¹⁹⁶ In Nigeria, discrimination in girls' access to education persists in many areas, owing to customary attitudes such as early marriages and pregnancies, to inadequate and gender-biased teaching and educational materials, sexual harassment and lack of adequate and physically and otherwise accessible schooling facilities. Initiatives undertaken to increase enrolment and retention of girls have been developed by Nigerian government and are being implemented. Such initiatives include the National Strategy on Girls' Education and FGN Funder Education Project.¹⁹⁷ To boost girl-child Education nationwide, tripartite partnership programme and funding between the Federal and State Governments and UNICEF had been launched since 2011 and has commenced disbursement of funds for the training of female teachers to States Universal Primary Education Boards. Sokoto state, one of the states with poor girl-child education record, trains 800 female teachers (2012-13) with N49.5m granted to 224 school-based management committees as critical components in achieving UBE for all.¹⁹⁸ Despite all the encouraging efforts from Government, early marriage is still a big cause of school drop outs, due to the ingrained negative cultural attitude. Another cultural norm which exists in many cultures is that educating girls is less valuable, or not expected, and these girls may instead work, providing domestic services, for instance. Early marriage is serious problem primarily, because it hinders a girl's chances of continuing with her education and this in turn hampers her life chances. As Tomasevski rightly pointed out;

¹⁹⁴ Art 23(2) CRC

¹⁹⁵ Art10 UNESCO note 37

¹⁹⁶ Beijing Platform for Action. Chapter IV. B. Education and training of women para 69

¹⁹⁷ CRC Concluding Observation of Report Submitted by Nigeria June 2010, CRC/C/NGA/Co/3-4, para 28 see also Nigeria's 5th Periodic Country Report: - 2011-2014 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria June 2014.

¹⁹⁸ Nigeria's 5th Periodic Country Report: - 2011-2014 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria June 2014, Section 2

Education operates as multiplier, enhancing the enjoyment of all rights and freedoms where the right to education is effectively guaranteed, as opposed to depriving people ...especially girls and women ...of the enjoyment of many if not all rights and freedoms where the right to education is violated...¹⁹⁹

In sum, education has a profound effect on girls and women's ability to claim other rights and achieve status in society, such as economic independence

Children living in conflict areas- During period of conflict, children have to leave their home and family environment and move into an unknown environment. Providing education in the time of conflict is a huge challenge. Religious conflict by Boko Haram sect in North Eastern part of Nigeria, particularly Borno and Adamawa states has negatively affected access to education of children in these areas. Schools and educational personnel are targets of violence, and infrastructure is often destroyed. Fear and disruption lead to poor learning outcome. Educational institutions and curricula may be harnessed by hostile groups and used to spread messages of hatred or to help justify and institutionalise conflict. Investment in education declines in times of conflict as other areas and sectors are given priority in these areas. The problem is that the government is focussed more on survival and education is not prioritised.

4.8.2 Legal Protection of right to education of the vulnerable children

The obligation for States for providing free, compulsory and universal primary education is clearly reflected in international instruments, notably the Convention against Discrimination in Education²⁰⁰ and the International Covenant on Economic, Social and Cultural Rights. Article 13 of ICESCR provides for the right to receive free and compulsory primary education, which should be made available to *everyone*²⁰¹, and enjoins upon the State Parties to the International Covenant obligation to 'prioritise the introduction of compulsory, free primary education'.²⁰² In essence, these provisions not only restate international legal obligations for the right to free and compulsory primary education, they also lay down the State obligation to ensure equal access to education for all children in the community. Similarly there have been political commitments to universalise basic education for all, free of cost for example in instruments such as; A Framework for Action in Sub- Saharan Africa:

¹⁹⁹ Tomasevski, K 'Human Rights in Education as Prerequisite for Human Rights Education', in *Right to Education Primers*, No. 4, (Gothenburg: Lund 2001), available at www.right-to-education.org

²⁰⁰ Article 4 UNESCO Convention against Discrimination in Education 1960

²⁰¹ Emphasis added

²⁰² Article 13(2)(a) ICESCR

Education for African Renaissance in the Twenty-first Century.²⁰³ The Framework provides that ‘Special attention shall be devoted to the rights of disadvantaged groups, including girls and women, ethnic minorities, the disabled, those affected by the HIV/AIDS pandemic and those in especially difficult circumstances in other ways.’²⁰⁴ Also, the Pretoria Declaration on Economic, Social and Cultural Rights in Africa²⁰⁵ in its paragraph 8 expounds the right to education as expressed in Article 17 of the ACHPR by enumerating its components:

Free and compulsory basic education, along with psychosocial educational programmes for the orphans and children from vulnerable categories; creation of schools and special services for the physically and mentally handicapped children; measures aimed at redressing the social, economic and cultural practices and attitudes which hinder the access to education of the girl child...

All these framework and declarations bear evidence to the importance accorded to normative action for basic education. They all reaffirm that education is a basic right and a basic need for all children in Nigeria including the vulnerable and those with disabilities, as recognized in the international instruments. It is clear that normative action aimed at achieving equality of opportunities in education, both in law and in fact, needs to be intensified. The application of the principle of equality of opportunity in education, which is common to various international human rights treaties, calls for greater emphasis on the fulfilment of State obligations. Another alternative is to seek protection for the right to education of these children by relying upon customary international law.²⁰⁶

4.9 Conclusion

As education operates as a sub-system of the whole social system, the viability of the educational system also depends on wider political, cultural and social factors. Frequent change and restructuring of the government affects continuous implementation of free primary education. This is evidenced in Nigeria’s case as analysed in this chapter. Thus, there

²⁰³ Education for All A Framework for Action in Sub-Saharan Africa: Education for African Renaissance in the Twenty-first Century Adopted by the Regional Conference on Education for All for Sub-Saharan Africa Johannesburg, South Africa, 6-10 December 1999 available at: http://www.unesco.org/education/efa/wef_2000/regional_frameworks/frame_africa.shtml accessed 22 May 2014

²⁰⁴ *Ibid*

²⁰⁵ The text of the Resolution is contained in the Statement by the African Union at the 61st Session of the Commission on Human Rights, (Geneva March-April 2005) on agenda item 10: economic, Social and Cultural Rights, Geneva March-April 2005.

²⁰⁶ According to Article 38(1) (b) of the ICJ Statute, customary international law is one of the sources of international law.

is need for the country to unify and sustain the wave of democracy sweeping the African continent. Democracy matters because frequent changes in government will hamper the continuity of policies for free primary education. Historically, Nigeria's educational sector has had problems ranging from political instability, lack of financial sustainability, no careful planning, inaccurate data or at times no available data, lack of accountability and no proper monitoring and evaluation of the various programmes. A functioning education system requires key building blocks to be in place to create the opportunity to learn. These include adequate facilities, qualified teachers who are enjoying job satisfaction and committed, appropriate curricula and teaching materials and high student attendance.²⁰⁷ The quality of education reflects one of its key purposes, namely maximising the development and abilities of all learners.²⁰⁸ The government's obligation to define and ensure the quality of education requires an assessment of the existing conditions against postulated goals through the use of appropriate human rights indicators and benchmarks. It has to be accepted that without sufficient resources good quality universal education will remain no more than an aspiration, high priority should be given, to setting aside, within the national budget, an adequate proportion of the national income for the development of education. Nigeria needs to address multiple forms of inequality and discrimination through comprehensive policies, it is therefore crucial to lay emphasis on the universal access to free and compulsory primary education for all children without exclusion or discrimination.

Accurate data and monitoring of learning achievement are also critical, for planning and budgeting, as well as for evaluation and accountability. Without accurate and reliable data, no meaningful planning can be done and it will be difficult to avoid policy breakdown at the implementation stage.²⁰⁹ Evidence from studies and reports across the country reveal that for primary education in Nigeria to achieve its stated objectives, these crucial issues of policy, funding, data, curriculum review and capacity building must be squarely addressed by the government.²¹⁰ The adoption and use of functional Education Management Information System (EMIS) at all levels of governance is a necessary measure for education authorities in Nigeria. Coupled with this, appropriate legal sanctions as prescribed by the UBE Act (2004) should be enforced on parents / guardians who refuse to send their children / wards to school.

²⁰⁷ Emechebe, S.N., 'Achieving Universal Basic Education in Nigeria: Issues of Relevance, Quality and Efficiency', (2012), Vol. 1. No.1, June *Global Voice of Educators*, p.3.

²⁰⁸ Hinchcliffe, note 136, p.25

²⁰⁹ *Ibid*

²¹⁰ Ejieh, 'The Universal Basic Education as an Effective Strategy for Meeting the Millennium Development Goals in Nigeria,' (2009) 6 *Nebula*, p.1.

Though, the application of sanctions can only be realistic if the UBE is indeed free. For instance, hidden costs should be eliminated by providing uniforms, books and other learning materials to the pupils or students free of charge.

Since education is a capital-intensive enterprise, free primary education is often implemented under conditions of budgetary constraints, thus, guaranteed sources of financing needs to be identified and explored and appropriate policies and legislation put in place to ensure effective utilization. There should be transparency about allocations and government spending on education. Government should commit itself to promote a culture of zero tolerance for all corrupt practices. Undoubtedly, misappropriating public resources meant for the educational sector and failing to address corruption and to provide an effective remedy to affected children constitute violations of the right to education.

Corruption and the associated lack of transparency and accountability have acted as obstacles to the implementation of free primary education in Nigeria for a long time as analysed in this chapter.²¹¹ Corruption has been identified as an obstacle to the fulfilment of the basic right to education for millions of children around the world.²¹² A more concerted attempt to realise the universal right to free and compulsory education requires recognition of universal obligations to respect, protect and fulfil the right to education for every child, including through obligations of international cooperation and assistance. Anything less than international education strategies which are based on and uphold the right to education and the rule of law, will not ensure that every child in Nigeria is guaranteed at the very least, free and compulsory primary education until the age of twelve. In sum, for universal free primary education to be achieved, a human-rights-based approach must be adopted, emphasising accountability, empowerment and participation. Having examined in political and socio-economic context the development of the various free primary education initiatives in Nigeria in this chapter, the next chapter analyses the legal, institutional and administrative framework for the implementation of free primary education in Nigeria.

²¹¹ *Global Corruption Report: Education*, Transparency International, (Oxford: Routledge, 2013) p.37.

²¹² *Ibid* ,p. 45.

Chapter Five

Domestic Application of the Right to Free and Compulsory Primary Education in Nigeria

5.1 Introduction

Chapter four of this thesis analysed the historical development of primary education in Nigeria from the beginning of the colonial period through to post-independent and current times. It described the two previous attempts to implement free primary education in Nigeria and the on-going UBE programme. From that analysis, it could be argued that while Nigeria has endeavoured to honour its commitments to provide free primary education to its populace, it has faced several barriers, such as insufficient funding, improper planning and political instability, with regard to achieving its effective implementation

This chapter follows up with the examination of the domestic legal, institutional and administrative frameworks for the implementation of free and compulsory primary education in Nigeria. International human rights treaties obligate state parties to recognise the rights in the treaties and to give effect to them by adopting all necessary legislative and other measures domestically. For example, the article 4 of the CRC provides that; ‘State parties shall undertake all appropriate, legislative, administrative and other measures for the implementation of the rights recognised in the ... Convention’. There are similar provisions in article 2(1) of the ICESCR and article 1(1) of the ACRWC, all of which are relevant to the right to education. The ratification of international human rights treaties is of benefit only if their provisions are implemented and have an impact at the national level. It is within this context that the implementation of the right to free and compulsory primary education in Nigeria is analysed. This chapter will examine how adequately the right is protected domestically as obligated under the relevant international human rights treaties and the extent of Nigeria’s compliance with international human rights standards in that regard. There are three dimensions to the domestic framework which determines the context of the implementation of right to education. The first consists of constitutional and legal guarantees; the second is the institutional infrastructure aimed at translating the right into practice and the third, is the governmental administration and delivery of service at both the federal and state levels.

First, the chapter considers the legal framework of the right to education in Nigeria. The legal framework of education is based on the 1999 Nigerian Constitution together with relevant federal laws namely the Child's Rights Act (CRA) 2003 and the UBE Act 2004. Whether these municipal legislations that regulate the right to education in Nigeria are adequately and /or effectively implemented and enforced in ensuring the right to free and compulsory primary education is investigated. Two main questions come up here; first, does a child have the ability to have a cause of action under the constitution, if his or her right to free and compulsory primary education is being hindered? Second, is the state accountable for not providing free and compulsory primary education? In answering these questions, the approach of the Nigerian judiciary regarding the justiciability of the right to education is highlighted in contrast with examples of judicial decisions in other jurisdictions. Also, the effectiveness of the protection of this right by other appropriate monitoring institutions, particularly the Nigerian Human Rights Commission (NHRC), is examined. Finally, the third part of the chapter analyses the management, structure and financing of primary education in Nigeria. By examining relevant constitutional provisions and other education policies on educational management and funding it will be revealed whether or not free and compulsory primary education is adequately funded in Nigeria.

5.2 The Right to Education in Countries' Constitutions

The right to education is one of the most universally recognized rights in national constitutions in the world today. The former UN Special rapporteur on the Right to Education, indicated that in 2001 there were unequivocal guarantees of the right to education in the constitutions of 142 countries and that only 44 countries did not include such provisions in their national constitutions.¹ A recent study of national constitutions found that 90 per cent of constitutions in the world contain a provision on the right to education.² Many African States' constitutions enunciate the right to education in their constitutions. Examples include the constitutions of Benin (1990), Cape Verde (1990), Togo (1992), South Africa (1996), and Ghana (1992). Some of these states' constitutions such as the constitutions of Kenya (2010) and Malawi (1994) recognise the right to education substantively in the constitution's Bill of Rights, while some states' constitutions, such as the constitutions of

¹ Tomasevski, K., *Free and Compulsory Education for all Children: The Gap between Promise and Performance* (Lund, 2001) p.19, available at <http://www.right-to-education.org/> accessed 26 March 2013.

² Comparative Constitutions Project, directed by Professors Zachary Elkins, University of Texas, Tom Ginsburg, University of Chicago, and James Melton, IMT Institute for Advanced Studies, <http://www.comparativeconstitutionsproject.org> [accessed 26 March 2013].

Nigeria (1999) and Sierra Leone (1991), do not contain the right to education in their Bill of Rights; but only recognised as part of the directive principles of state policy.

5.3 The Nigerian Legal Framework on Education

5.3.1 Right to Education in the Nigerian Constitution

The Nigerian constitution is the fundamental law against which all inconsistent enactments are void.³ This is based on the doctrine of the supremacy of the constitution, which is emphasised in the constitution itself. The Nigerian constitution provides that ‘... if any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void’.⁴ Education is grouped under the section on “Fundamental Objectives and Directive Principles of State Policy” in the Nigerian constitution, wherein “free, compulsory and universal primary education” is listed as an objective of state policy⁵ rather than a substantive right under the constitution. Thus, free and compulsory primary education is not currently a constitutionally guaranteed right in Nigeria. With regard to the doctrine of the supremacy of the constitution, the right to education as a directive principle of state policy, and not a substantive right in the bill of rights, prevails over its protection than under other domestic legislations. It is submitted herein that promoting and ensuring the right to free basic education for children in Nigeria will only be achievable if there is a constitutional amendment guaranteeing the right to free, compulsory and universal primary education as a substantive and justiciable right. The Constitution of Nigeria has two specific chapters relating to human rights and human development policies for governance administration in Nigeria. The sections on Fundamental Rights in chapter IV and the sections on Directive Principles of State Policy in Chapter II, both form core provisions of the Nigerian Constitution. However, in the constitution, a Directive Principle is distinguishable from a fundamental right in so far as a Directive Principle shall not be enforceable in any court.⁶ The Directive Principles provide the guidance, motivation and purpose for legislative policy. As Alston and Bhuta have pointed out;

³ Elias, T., Nigeria: *The Development of its Laws and Constitution*, (London: Stevens and Sons 1967), p. 133.

⁴ S.1 (3) 1999 Constitution of Nigeria.

⁵ S.18(3)(a) 1999 Constitution of Nigeria

⁶ S.6 (6) (c) 1999 Constitution of Nigeria

[...] a Directive Principle is phrased in terms of an important duty incumbent upon the State, but one that is to be implemented by the executive and legislative arms of government without intervention or oversight by the judiciary’.⁷

5.3.1.1 Constitutional Provision on the Right to Free and Compulsory Primary Education

The Constitution defines the nation’s educational objectives⁸ and regulates the sharing of responsibilities for education among the three levels of government – federal, state and local.⁹ The educational objectives provision in Chapter II of the 1999 Constitution is as follows:

(1) ‘Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels. (2) Government shall promote science and technology. (3) Government shall strive to eradicate illiteracy; and to this end, government shall as when practicable provide- (a) Free, compulsory and universal primary education;’¹⁰

Section 18 makes the realisation of the right to education non- committing through the use of the expressions “strive to eradicate”, and, “as when practicable”. This allows the government no specific time frame for the provision of free compulsory universal primary education as no definite time is given to achieve the objectives. This promise has still not yet been met. With such wording in the constitution, there is a constitutional silence about the substantive commitment of the government in providing free, compulsory primary education to the children in the nearest future in Nigeria. The element ‘shall as when practicable’ is criticised for being too vague. This poses a challenge under international law, because the state can argue for a variety of time frames when this is brought up in international litigation as was reflected in the case of *SERAP v. Federal Republic of Nigeria*.¹¹ Therefore the State needs to specify guidelines on what constitutes ‘when practicable’ or give specific deadline such as 1, 5, or 10 years’ time.¹² Afterwards, government shall develop a plan to progressively realise the attainment of this right, failure of which will amount to a violation. Having ratified relevant international instruments on the rights to free primary education namely, the

⁷ Alston, P. & Bhuta, N., ‘Human Rights and Public Goods: Education as a Fundamental Right in India’ in; P. Alston and M. Robinson (eds.) *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005), p.252.

⁸ S.18 1999 Constitution of Nigeria

⁹ 2nd Schedule Part 1, para 60(e); S.4(7) & part II 2nd Schedule para 30; S.7(5) & 4th Schedule para 2 1999 Constitution of Nigeria

¹⁰ S.18 1999 Constitution of Nigeria

¹¹ *SERAP v. Federal Republic of Nigeria & UBEC* ECW/CCJ/APP/12/7.

¹² Article 38 1992 Constitution of Ghana

ICESCR,¹³ the CRC¹⁴ and the ACRWC,¹⁵ Nigeria is bound by the obligations under these treaties.¹⁶ In relation to introduction of free compulsory primary education, it is a specific legal obligation whereby States' parties have immediate obligations in relation to the right to education. In the case of primary education unlike secondary or higher education, the obligation to provide primary education for all is an immediate duty on all state parties.¹⁷ In addition, the ICESCR Committee has explained at length that nevertheless, the fact that realisation over time, or in other words progressively, is foreseen under the Covenant, this should not be misinterpreted as depriving the obligation of all meaningful content.¹⁸ It thus imposes an obligation on states to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberate retrogressive measures in that regard would require the most careful consideration and would need to be fully justified.¹⁹ It has also been observed that "progressive realisation means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation of Article 13 ICESCR [on the right to education]".²⁰ Kumar has pointed out that it is possible that the standard of progressive realisation may be used by States to claim a lack of resources as the reason for not meeting the obligations relating to the right to education.²¹ It can also be argued that progressive realisation extends so long as the delay is attributable to causes beyond the control of the state, and that the state has not acted negligently or deliberately. The Maastricht Guidelines provides that state have the burden of proof to show that causes of

¹³ International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), 993UNTS 3 entered into force January 3 1976, the right to education is recognised in articles 13 and 14 of the Covenant. Nigeria ratified the Covenant on 29 July 1993 without any reservation. The ICESCR is not a child specific instrument but has extensive provisions on the rights to education which is applicable to both adults and children.

¹⁴ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> [accessed 7 March 2012]. Nigeria ratified the UN CRC on 19th April 1991. Article 28 provides the right to education

¹⁵ OAU Doc.CAB/LEG/24.9/49(1990) entered into force 29 November 1999. Nigeria ratified the ACRWC on 23rd July 2001 Art 11 for right to education

¹⁶ Article 14(2) Vienna Convention: 'The consent of a state to be bound by a treaty is expressed by ratification'.

¹⁷ CESCR *General Comment 13 The Right to Education (article 13 of the Covenant)* E/C.12/1999/10 (8 December 1999) para 51 available at: <http://www.refworld.org/docid/4538838e10.html> accessed 18 August 2014.

¹⁸ CESCR *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, E/1991/23, (14 December 1990) para 9. available at: <http://www.refworld.org/docid/4538838e10.html> [accessed 18 August 2014].

¹⁹ *Ibid*

²⁰ *Ibid* para 44

²¹ Kumar, Raj., 'International Human Rights Perspectives on the Fundamental Right to Education-Integration of Human Rights and Human Development in the Indian Constitution', (2004) 12 *Tulane. J. Int'l & Comp. Law*, 237 at 250.

delay for non-compliance is beyond its control.²² A number of restrictions have been imposed on progressive realization, both through the language of restrictions the ICESCR and its following interpretation.²³ The CESCR Committee has established that there is a "minimum core content" with regard to each economic, social, and cultural right which all State parties have obligations to fulfil.²⁴ Ssenyonjo points out that the obligation depends on the political will of the executive and the legislature to take the necessary steps.²⁵ For example by enacting legislature or prioritising budget allocation for the ESC rights.²⁶ Nigeria being a party to the treaty has, through its constitutional provision of not being time specific on the provision of free compulsory universal primary education, failed to comply with this international human rights obligation under the Covenant. In its 2010 concluding observation to Nigeria's report submitted to the CRC Committee, the Committee recommended that Nigeria should ensure effective implementation of its National Plan of Action on CRC/CRA 2009-2015 of 2008, which puts children first as a state policy in matters relating to education and other things, by designing and implementing a cost plan with clear indicators and allocating adequate financial and human resources for its operationalisation.²⁷

5.3.1.2 Justiciability of the Right to Education under the Nigerian Constitution

In Nigeria, judicial attitude to litigation on socio-economic rights is characterised by great caution and passivity.²⁸ The Constitution expressly bars the courts from enforcing the provisions of chapter II of the constitution by ousting the jurisdiction of the courts from questioning whether any act or omission is in conformity with the Fundamental Objectives and Directive Principles of State Policy,²⁹. Therefore non-compliance to the provisions of chapter II of the constitution cannot be taken as a claim for enforcement against the state. Thus because the right to education is placed under the Fundamental Objectives and Directive Principle of State Policy in chapter II of the constitution, its implementation and enforcement faces constraints. This runs contrary to its obligation under international human

²² Guideline 13 of the Maastricht Guidelines. The Maastricht Guidelines on violations of Economic, Social and Cultural Rights were adopted on the occasion of the 10th anniversary of the Limburg Principles on the implementation of ICESCR. Available at www.umcn.edu/human_rts/instree/Maastrichtguidelines_.html.

²³ Kumar, note 21

²⁴ CESCR, *General Comment No. 3*, note 18, para. 10.

²⁵ Ssenyonjo, M. 'Reflections on States Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law', (2011) Vol.15, No.6, *The International Journal of Human Rights*, 969 at 976.

²⁶ *Ibid*

²⁷ Concluding observations: Nigeria, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, CRC/C/NGA/CO/3-4, 21 June 2010, para 71

²⁸ Ibe, S. 'Beyond justiciability: Realising the Promise of Socio-Economic Rights in Nigeria', (2007) 7 *Afr. Hum. Rts. L.J.* p.241.

²⁹ S.6 (6)(c) 1999 Constitution of Nigeria

rights laws. For example, article 2(3) of the ICCPR provides that State parties are to ensure that any person whose rights or freedom recognized by the Covenant are violated shall be able "to develop the possibilities of judicial remedies" enforceable, when granted, by competent authorities.³⁰ The ICESCR contains no clear counterpart to these provisions, but Article 2(1) of the ICESCR is usually interpreted as referring indirectly to justiciability. Article 2(1), provides that;

[...] each State Party to the Covenant undertakes to take steps, individually and through international assistance and co-operation to the maximum of its available resources, with a view to progressively achieve the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.³¹

There is dearth of judicial jurisprudence on the right to education in Nigeria because of the constitutional provision which has ousted the courts' jurisdiction on its justiciability.³² There appears to be an apparent contradiction between section 6(6)(c) and section 13 of the constitution in that regard. While on the one hand, section 13 of the constitution, which is the opening provision in chapter II, provides that "It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution", section 6(6)(c), on the other hand, provides that "The judicial powers vested in accordance with the foregoing provisions of this section ... shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution". Justice Mamman Nasir of the Nigerian Court of Appeal stated in a case concerning the justiciability of socio-economic rights in *Archbishop Anthony Okogie & ors v The Attorney General of Lagos State*,³³ that "[...] It is clear that Section 13 has not made Chapter II justiciable."³⁴ ...the arbiter for any breach of and guardian of the fundamental objectives [...] is the legislature itself or the electorate.³⁵ He thus made it clear that the court has no jurisdiction to pronounce any decision as to whether any organ of

³⁰ Art 2(3), ICCPR.

³¹ Art.2(1) ICESCR

³² S.6(6)(c) 1999 Nigeria Constitution

³³ *Archbishop Okogie & ors V A.G. Lagos State*, (1981), 2 NCLR p.350

³⁴ *Ibid.*

³⁵ *Ibid*

government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles under chapter II of the constitution. This contradicts the rights-based approach which focuses on the states' obligation to fulfil, respect and protect internationally defined human rights, including economic, social and cultural rights. In so doing, the rights-based approach aims to support and empower individuals and communities to claim their rights, including the right to education. It is submitted that refusal by the courts of this responsibility is incompatible with the international human rights standards, which must always be taken to include respect for international human rights obligations. Decisions by courts in other jurisdictions demonstrate how they have upheld the right to education in its various dimensions even when not explicitly identified in the constitution.³⁶ Even though the right to education is framed as a Directive Principle, it could be fully justiciable when read in conjunction with the duty of the state to guarantee and enforce equal treatment in law and in fact for all citizens of the state.³⁷

An effective way of challenging a violation of the right to education before the courts would seem to be through the principles of non-discrimination and equal treatment. Article 2(2) of the ICESCR is a non-discrimination provision, which provides that: "The States Parties to the present Covenant guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The leading Nigerian case on discrimination to education is *Badejo v. Federal Minister for Education & 2 others*,³⁸ where the court denied access to judicial remedies and the enforcement of this right based on a technical interpretation of the law. Plaintiff had alleged that she was denied being called for interview for admission into a public funded secondary education institution because of the policy of quota system which discriminated against her because of her state of origin, whereas, pupils from some other states who scored lower marks were called for the interview. The court held that the interview complained of had already been completed about 15 months earlier and the matter had been overtaken by events. The court also held that the interest of the State to the sustenance of the educational system prevailed over the rights of the applicant to educational system. This decision is criticised because, recognising that state parties have a negative duty not to act in such a manner as to

³⁶ See for example; *Brown v. Board of Education*. 347 US 483 (1954), *Unni Krishnan J.P. v State of Andhra Pradesh*, (1993) AIR SC 2178, *Mohini Jain v State of Karnataka*, (1992) AIR SC 1858 and *Government of Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

³⁷ *Unni Krishnan, J.P. v. State of A.P.* (1993) 1 SCC 645

³⁸ *Badejo v. Federal Minister for Education & 2 others*, (1996) Part 464, 8 NWLR p. 15.

discriminate against any person. Where two children of different ethnic origin have same /equal scores in entrance examination, they are entitled to the same methods of admission, failure of which the children may lose their trust in the state not to discriminate against them. It is submitted, with respect, that it was wrong for the court to have let the interest of the State to the sustenance of the educational system prevail over plaintiff's right to equality under the educational system. In the Nigerian constitution freedom from discrimination is a fundamental right.³⁹ Although Nigerian constitution guarantees non- discrimination on grounds of sex, religion, ethnicity, political opinion, circumstances of birth and place of origin, however, it is noted that while guaranteeing equality before the law, it is silent on the relation between potentially discriminatory customary or religious laws and the non-discrimination provision. Early marriage for example, hinders a girl's chances of continuing with her education and this in turn hampers her life chances. The constitution guarantees equality, the principle of constitutional supremacy should prevail. If the constitution is the supreme law of the country, one would expect that other laws such as customary and other personal laws should be in compliance therewith. Article 26 of the ICCPR also states that '[...] all persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. In this respect, the law should prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination.

Nigerian courts manifest a general discomfort with broadening access to judicial redress in socio-economic law cases generally. Nonetheless, an aggrieved individual after exhausting available domestic remedies can also go to regional or sub-regional courts to challenge violation of a socio-economic right by a state party.⁴⁰ The case *SERAP v. Nigeria*⁴¹ was brought before the Community Court of Justice (CCJ) of the ECOWAS⁴² by the Socio-

³⁹ S.42 (2) 1999 Constitution of Nigeria: 'No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth'.

⁴⁰ If no domestic remedies are available or there is unreasonable delay on the part of national courts in granting a remedy, clearly, a person should have recourse to international remedies. The rule of local remedies should not constitute an unjustified impediment to access to the international remedies. Article 9(4) of the Supplementary Protocol A/SP.1/01/05 grants the Court jurisdiction to determine cases of violations of human rights in Member States of ECOWAS.

⁴¹ *SERAP v. Nigeria*, note 11.

⁴² ECOWAS was established in 28 May 1975 and comprises 15 member states: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. Article 15 of the Treaty of ECOWAS provided for the establishment of the Community Court of Justice. The CCJ has, among other competencies, the jurisdiction to hear human rights cases based on general principles of international and regional human rights law article 9 (4) of the supplementary protocol (supplementary protocol A/SP.1/01/05). The judgments of the court are binding on member states.

Economic Rights and Accountability Project (SERAP) in October 2009.⁴³ The case highlighted the impact that a national civil society organisation such as the SERAP could have in utilising public interest litigation, through human rights law. This case reinforced that the state holds legal obligations to fulfil the right to education and that these obligations are justiciable before an international court.⁴⁴ The underlying point is that it is essential to ensure that complaints surrounding the right to free primary education violations can be adjudicated and that the adjudicator's decision will be respected and implemented. Nigeria is yet to implement the court's judgement in this case. Despite the judgment being binding on Nigeria and immediately enforceable,⁴⁵ there are no clear provisions on who is to effect or execute the decisions of the court. In addition to the obligation to take legislative and policy measures, state must ensure that effective remedies are in place for children or their representatives to effectuate their right to education. Nolan notes that economic, social and cultural rights are incorporated in constitutions of several countries now,⁴⁶ but despite their integration in national constitutions of African countries too, the actual realisation of these rights has not been evident.

5.3.2 Domestic Application of the African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (ACHPR) was adopted by the Organisation of African Unity in 1981.⁴⁷ Nigeria ratified the treaty on 22nd June 1983 in accordance with section 12 (1) of the 1999 Constitution of Nigeria which provides that: 'No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. It thus became a domestic law by virtue of The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.⁴⁸

⁴³ The Socio-Economic Rights and Accountability Project (SERAP) is a non-governmental organisation committed to promoting transparency and accountability in the Nigerian public and private sectors through human rights research, advocacy, litigation and the provision of legal services. SERAP holds observer status with the African Commission on Human and Peoples' Rights in Banjul, the Gambia, which allows it to submit cases to the African Court on Human and Peoples' Rights, as well as to the sub-regional Community Court of Justice of ECOWAS.

⁴⁴ Article 17 ACHPR, and SS. 7, 14–19 ICESCR.

⁴⁵ Article 15(4) of the ECOWAS Treaty, article 19(2) of the 1991 protocol.

⁴⁶ Nolan, A. 'The child's rights to health and the courts', in: J. Harrington & M. Stuttaford (eds), *Global Health and Human Rights*, (London: Routledge 2012), p.142.

⁴⁷ African (Banjul) Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) available at

http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf [accessed 26 June 2014]

⁴⁸ Cap 10 Laws of the Federation of Nigeria 1990.

The right to education is protected under article 17 of the ACHPR.⁴⁹ ACHPR is an important regional treaty in Nigeria for the following reasons: First, Nigeria is the only dualist state that has explicitly incorporated (domesticated) the African Charter when it adopted the ACHPR (Ratification and Enforcement) Act.⁵⁰ Secondly, in a case brought before the ECOWAS court by an NGO, Socio-Economic Rights and Accountability Project (SERAP), against the Republic of Nigeria, including the Universal Basic Education Commission (UBEC which is the legal entity responsible for implementing education in Nigeria),⁵¹ a violation of the right to education under Article 17 of the ACHPR was alleged, for failure to ensure quality education. Nigeria argued that the Court lacked jurisdiction to hear the case because it dealt with domestic laws and policy which are not within the subject matter jurisdiction of the Court.

Relying on Article 9(4) of the Supplementary Protocol to the treaty establishing the Court and Article 4(g) of the Revised Treaty of ECOWAS, the court went on to say that it 'clearly has jurisdiction to adjudicate on applications concerning the violation of human rights that occur in Member States of ECOWAS.'⁵² It ruled that; 'it is well established that the rights guaranteed by the African Charter are justiciable before this Court.'⁵³ Article 9(4) of the Supplementary Protocol grants the Court jurisdiction to determine cases of violations of human rights in Member States of ECOWAS while Article 4(g) of the Revised Treaty of ECOWAS incorporated the African Charter on Human and Peoples' Rights into that treaty. The Court noted a distinction between the recognition of education within the domestic legal framework of Nigeria and the human right to education in the ACHPR to which Nigeria is a State Party. Court reiterated that it has jurisdiction over human rights enshrined in the African Charter and the fact that these rights are domesticated in the municipal law of Nigeria cannot oust the jurisdiction of the Court. The outcome is that a sub-regional or regional court can take a different approach than the one that prevails at the national level and enforce socio-economic rights such as right to education. Evidence for this new paradigm is this *SERAP* case. This judgment is significant in that it is an addition to the body of jurisprudence, which treats socio-economic rights as judicially enforceable rights.

⁴⁹ Article 17 ACHPR

⁵⁰ Laws of the Federation, 1990 ch10

⁵¹ *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*, No. ECW/CCJ/APP/0808 Ruling: available at https://www.escri-net.org/sites/default/files/SERAP_v_Nigeria.pdf accessed 24 June 2014.

⁵² *Ibid*

⁵³ *Ibid*

5.3.3 Right to Education under the Child's Rights Act (CRA) 2003

The CRC Committee has provided clear guidelines for implementation of the CRC by State Parties.⁵⁴ Although the Convention does not formally require State Parties to incorporate the provisions into domestic law, the CRC Committee has recognised that such an approach is desirable in order to ensure that domestic legislation is compatible with the principles and provisions of the Convention.⁵⁵ Nigeria having ratified the CRC,⁵⁶ thereby agree to 'respect and ensure' the children's rights set forth therein.⁵⁷ Nigeria thereby committed itself to conform its legislation, and administrative practice to the requirement contained in the CRC, through the enactment of the Child's Rights Act (CRA) of 2003, which is the national legislation which protects the rights of children in Nigeria. The CRA was enacted as a comprehensive law to deal with issues relating to children with the aim of providing more protection for children in Nigeria.

Under the Constitution, children are classified for legislation under residual matters which is legislated by the states.⁵⁸ Each state can adopt or refuse to adopt any law enacted at the national level on children. Hence, no court can prosecute violations of the Child Rights Act in states that have not enacted it. Nigeria enacted the CRA as its national legislation on 16 July 2003 with the aim of giving effect to the principles of the CRC and the ACRWC. However, since its enactment, the CRA has had problems with opposition from some Northern states, where there is a large population of Muslims, on grounds that some provisions of the CRA were deemed as contrary to Islamic norms, especially the provisions on marriageable age and gender discrimination against girls. The CRA stipulates eighteen years as the marriageable age⁵⁹ whereas under customary and Islamic laws, a girl child who has attained puberty is marriageable. This custom has been an impediment to the education of the girl-child for

⁵⁴ Committee on the Rights of the Child, *General Comment No.5, General Measures of Implementation of the Convention on the Rights of the Child (art 4, para6)* CRC/GC/2003/5 (2003).

⁵⁵ Hodgkin, R. & Newell, Peter *Implementation Handbook for the Convention on the Rights of the Child* (New York; UNICEF, 2002) 65.

⁵⁶ Nigeria ratified CRC on 19 April 1991. See: Office of the High Commissioner of Human Rights, Status of ratification of the Convention on the Rights of the Child, available at: <http://www.ohchr.org/english/law/crc-ratify.htm/> accessed 12 August 2012.

⁵⁷ Art 26 Vienna Convention on the Law of Treaties UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969) available at: https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf accessed 12 August 2012.

⁵⁸ Section 4 (7) and 2nd Schedule, Parts I and II. In the Nigerian Constitution, laws on matters pertaining to children are not listed on either the exclusive or the concurrent list, it is therefore in the residual list, which are to be legislated on by the states' legislatures.

⁵⁹ S.21 CRA.

many years in Nigeria. Apart from the predominantly Muslim North of Nigeria, the South Eastern states are opposing the CRA on the ground that it is contrary to the customs, especially where daughters cannot inherit landed property from their parents. There was opposition to the enactment because the Act introduced values that were against religious and cultural beliefs of the people.⁶⁰ These cultural and religious obstacles have prevented some of the states from adopting the CRA into their state legislations. This opposition is directly against the non-discrimination stipulated in both the CRC⁶¹ and the ACRWC,⁶² and also runs contrary to the Nigerian Constitution which provides that no child shall be discriminated against as a result of gender, religion, or circumstances of birth.⁶³ So far, 26 of the 36 states have adopted the CRA into their state legislation since 2003. The CRC Committee has recommended that a comprehensive review on the compatibility of the existing statutory, religious (sharia) and customary laws with the Convention and the CRA be undertaken by Nigeria.⁶⁴ The Committee has also strongly recommended that Nigeria should ensure that the CRA is included in the concurrent list of legislation which would make it automatically applicable in all states of the federation.⁶⁵

Section 15 of the CRA provides for the right to free and compulsory primary education as follows;

Every child has the right to free, compulsory and universal basic education and it shall be the duty of the Government in Nigeria to provide such education [...] every parent or guardian shall ensure that his child or ward attend and completes his Primary school education and junior secondary education.

The section stipulates that primary and junior secondary education should be provided free by the government to the children.⁶⁶ However, as discussed earlier, the right to free and compulsory primary education cannot be enforced or challenged in court, because the Constitution of Nigeria, which is the *grundnorm*, states that ‘the government shall when

⁶⁰ Owasanoye, B., ‘The Regulation of Child Custody and Access in Nigeria, Vol 39 No 2 *Family Law Quarterly*, p 405.

⁶¹ Art.2 CRC

⁶² Art. 3 ACRWC

⁶³ S. 42 (2) 1990 Constitution of Nigeria. S.10 of the CRA also prohibits discrimination against any child on grounds of gender, religion or circumstances of birth. But under Sharia law the son inherits twice what the daughter inherits. In South Eastern Nigeria, only sons can inherit landed property. This is to prevent a non-family member (i.e a son-in-law) from inheriting from the wife’s family.

⁶⁴ Considerations of Reports Submitted by State Parties Under Article 44 of the Convention Concluding observations: Nigeria CRC/C/NGA/CO/3-4, 21st June 2010, paras 7 & 8

⁶⁵ *Ibid*

⁶⁶ S. 15 of the CRA.

practicable, provide free, compulsory and universal primary education’. Section 1 of the Constitution provides that, ‘[t]his Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria ‘[...], [if] any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void’.⁶⁷ The constitutional provision on education in section 18 undermines Section 15 of the CRA in authority; therefore Section 15 of the CRA cannot be effectively implemented or enforced judicially. This was noted by the CRC Committee in its 2010 Concluding Observation on Nigeria.⁶⁸ The CRC Committee has urged Nigeria, taking into account its General Comment No. 1 of 2001 on the aims of education, to ensure that the right to free and compulsory education is incorporated into the Constitution within the context of the constitutional review.⁶⁹ Presently, the right to free and compulsory primary education is guaranteed only in the CRA and not protected in the constitution of Nigeria. The Committee of the CRC also urged the government to ensure primary education is provided non-discriminatorily for all children and emphasised the abolishing of fees.⁷⁰ The CRA provides that primary education shall be compulsory and obliges parents and guardians to ensure their children attend school; with fines and imprisonment as possible punishments for defaulting parents or guardians.⁷¹ The mode of enforcement is not stated in the legislation. Evidently, S.15 of the CRA is framed to conform to Article 28 of the CRC but it greatly falls short of effective implementation. The Committee of the CRC has established that provisions of the CRC must be directly applicable and appropriately enforced. States parties are to provide information on remedies available and their accessibility to children.⁷²

5.3.4 The Compulsory Free Universal Basic Education Act 2004 (also known as UBE Act)

The right to ‘basic’ education as such is not reflected in the international treaties and conventions in the field of education. The word ‘primary’ education is used in most Covenants and Conventions.⁷³ However, the right to education has been interpreted as part of

⁶⁷ Section 1(1) & (3) 1999 Constitution of Nigeria

⁶⁸ Concluding observations: Nigeria CRC/C/NGA/CO/3-4, para 8

⁶⁹ *Ibid* para 72

⁷⁰ *Ibid* para. 72 a

⁷¹ S. 15 (6) CRA.

⁷² General Guidelines regarding the form and content of periodic reports to be submitted by State Parties under Article 44 of the CRC, UN Doc. CRC/C/58/Rev.1, 29 November 2005. Available at www.unhchr.ch/tbs.nsf/ accessed 24 April 2013.

⁷³ Article 28(1) (a) CRC, Article 13(2) (a) ICESCR

the EFA process to recognize the significance of basic education as a fundamental human right. The importance of basic education was acknowledged at the World Conference on Education for All (Jomtien, Thailand, 1990)⁷⁴ and was reaffirmed at the World Education Forum (2000). The Dakar Framework for Action uses both terms, ‘primary’ education interchangeably with ‘basic’ education.⁷⁵ The ESCR Committee’s General Comment No. 13 on the Right to Education refers to basic education delivery as an obligation of the state. Political commitments to basic education were reiterated⁷⁶ as part of the EFA process and high political significance has been attached to the right to basic education.⁷⁷ The ACRWC provides in Article 11 that: “Every child shall have the right to an education [...] States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular: Provide free basic education”.

In line with its commitments to the declarations at the World Education Forum and the EFA goals, in May 2004, the Nigerian legislature passed the UBE Bill, ‘The Compulsory Free Universal Basic Education Act No 66 of 2004’ into law. It represents the most significant reform in education in Nigeria and addresses the issues of access, equality, equity, inclusiveness, affordability and quality.⁷⁸ The Act makes a distinction between “Basic Education” and “Universal Basic Education”. The Act defines ‘Basic Education’ as ‘early childhood care and education and nine years of formal schooling’. Universal basic education is defined in the Act as; “early childhood care and education, nine years of formal schooling, and also includes literacy and non-formal education, skills acquisition programmes and the education of special groups such as nomadic and migrants, girl-child and women, almajiri, street children and disabled groups.”⁷⁹ In other words, basic education is strictly formal type of education, whereas universal basic education comprises of combination of formal and non-

⁷⁴ Recalling that “education is a fundamental right for all people, women and men of all ages, throughout our world”, the World Declaration on Education for All adopted changes at the Conference stipulates that “Basic education should be provided to all children, youth and adults”.

⁷⁵ The Dakar Framework for Action. Education for All: Meeting our Collective Commitments .Dakar, Senegal, 26-28 April 2000

⁷⁶ The Declaration adopted by the E-9 Ministerial Review Meeting, in Recife, Brazil, (31 January-2 February 2000) on the eve of the World Education Forum (2000), the E-9 countries underlined the need for a new visionary agenda for the new millennium that will reaffirm “basic education as a human right”.

⁷⁷ Governments’ responsibility for providing basic education for all in the pursuit of EFA goals has been underlined in the Joint Statement of 26 April 2002 made by UNDP and the World Bank UNFPA, UNICEF on the occasion of the second Dakar anniversary of the World Education Forum: “Governments have the responsibility of providing basic education for all. Access to education is a fundamental human right. Millions of people legitimately expect to have access to quality education (...)”

⁷⁸ World Data on Education 7th edition, 2010/11. Compiled by UNESCO-IBE <http://www.ibe.unesco.org/>

⁷⁹ Section 15 (1) UBE Act2004

formal education. The aim is to give opportunities to learners who do not have access to formal education settings.

The Act provides that every Government in Nigeria shall provide free compulsory and universal basic education for every child of primary and junior secondary school age.⁸⁰ The government in this provision refers to the 36 states' governments since matters on education apart from university education are within the purview of the state governments.⁸¹ Governments in Nigeria (Federal, State and Local) have primary responsibility to fund and manage basic education; with Federal Government playing the intervention/assisting role. Each state government is under duty to ensure that every child in its state has access to free universal basic education. Under the Act, the goods and services to be provided free of charge in public schools are tuition, books, instructional materials, classrooms furniture and mid-day meal; therefore, there is abolition of all forms of fees and levies.⁸² According to the UBE Act, charging fees or levies should attract sanction.⁸³ Despite this provision however, in practice levies and other forms of charges such as money for textbooks and furniture are still being paid in most public primary schools in Nigeria.⁸⁴ It is however, true that the financial burden on government often forces parents to get involved in funding this basic level of education. No school head has been sanctioned over the collection of 'illegal' fees because the government funding expended is far well below what is needed to maintain the school. So the shortfall had to be made up. UBE seeks to ensure the access of all children of primary and junior secondary school age (6-14+ years) in Nigeria to free, compulsory and universal basic education. The programme of UBE is to include skill acquisition to fit the children into employment and job creation. Insufficient funding is certainly affecting the implementation of government policies on education

The Act obligates every parent to ensure that his/her child attends and completes primary and junior secondary school education. There is sanction for parents or guardians who refuses or fail to allow their children to attend school.⁸⁵ As with the sanction in the CRA, no parent is yet to be fined or imprisoned because the law is silent over the enforcement procedure. However, realistically the law cannot force parents to ensure education for their children if education is

⁸⁰ Section 2 UBE Act 2004

⁸¹ S.4(8) 1999 Constitution of Nigeria

⁸² S 15 (1) UBE Act 2004

⁸³ SS. 2, 3 & 15 UBE Act.

⁸⁴ Yusuf A & Ajere R. 'Universal Basic Education (UBE) in Nigeria' Retrieved from <http://www.unilorin.edu> [accessed 13 March 2014].

⁸⁵ S.2 UBE Act.

unaffordable or beyond their means, in situations where indirect and unofficial fees are still being collected by the schools contrary to the provisions of the UBE Act. The provisions of this Act though impressive, their implementation is a problem. The problems confronting the administration and management of the UBE programme has been discussed extensively in chapter four of the thesis. In sum, the UBE Act 2004 is a law aimed at promoting rights of children to free and compulsory basic education in Nigeria.

5.4 The Nigerian Institutional Framework on Education

UN human rights bodies have addressed the subject of national human rights institutions since 1946.⁸⁶ The 1991 UN International Workshop on National Institutions for the Promotion and Protection of Human Rights resulted in the drafting of guiding principles that were adopted by the UN Commission on Human Rights as "Principles Relating to the Status of National Institutions" in 1992 and by the General Assembly in 1993.⁸⁷ Also, the CRC Committee encourages the setting up of independent national human rights institutions specialising in the rights of the child, such as ombudsmen, who should reach out in particular to the most vulnerable and disadvantaged children.⁸⁸ The Committee also favours institutions that have the power to provide remedies for breaches of children's rights.⁸⁹

In line with the resolution of the UN General Assembly which enjoins all member States to establish national human rights institutions for the promotion and protection of human rights, the Nigerian government established the National Human Rights Commission (NHRC) in 1995. The National Human Rights Commission established by the NHRC Act Cap.N46 Vol.11 Laws of the Federation of Nigeria 2004 as amended by the NHRC Act 2010 is mandated to promote and protect human rights and to ensure discharge of Nigeria's human rights obligations. The Commission serves as an extra-judicial mechanism for the enhancement of the enjoyment of human rights generally in Nigeria. It also provides avenues for public enlightenment, research and dialogue in order to raise awareness on human rights

⁸⁶ United Nations Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No. 4 at 4-6, U.N. Doc. HR/P/PT/4, U.N. Sales No. E.95.XIV.2 (1995) [hereinafter *National Human Rights Institutions: A Handbook*].

⁸⁷ G.A. Res. 134, UN GAOR, 48th Sess., 85th mtg., U.N. Doc. A/RES/48/134(1993), reprinted in *National Human Rights Institutions: A Handbook*, pp. 37-38.

⁸⁸ CRC Committee *General Comment 2, The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child*, UN doc. CRC/GC/2002/2.

⁸⁹ CRC Committee *General Comment 5 General Measures of implementation for the Convention on the Rights of the Child* UN doc. CRC/GC/2003/5);

issues. The degree of success of national human rights institutions in achieving these objectives is dependent on the existence and strength of legal, financial, political, and social factors. A complaint/treatment mechanism has been put in place at the headquarters and all the six Zonal Offices of the NHRC to handle all complaints of human rights violations. Additional offices are now being established to increase access to the Commission's complaint/treatment mechanism.⁹⁰ Victims of human rights violations can access the services of the Commission free of charge.

In view of the non-justiciability of economic, social and cultural rights in Chapter II of the Constitution, this has constituted a hindrance to victims from bringing violations of these categories of rights to the Commission. Although the NHRC typically, may not have the power to make binding decisions in response to complaints of human rights violations or maladministration by government, they still can play a valuable role in human rights protection and oversight of administrative behaviour, for example through providing a viable forum for the investigation and resolution of human rights complaints brought before it. NHRC can play a valuable role in human rights protection of the child including right to education in respect of violations of right to education of the child. For example the NHRC can investigate into complaints over refusal of access to school for non-payment of certain fees, or where the child is prevented by a third party from receiving education. Cases brought against the government for violation of children's rights have not been known to be brought before the NHRC.⁹¹ This raises the question about the ability of the Commission to operate independently and impartially when investigations are on the government and government agencies. This depends on the degree of independence of the Commission from the government's influence. Developing the institution's responsibilities of quasi-judicial decision making, will ease the flood of litigations in the court and will serve as a quicker measure to enable realisation of children's rights to education. NHRC increase the accessibility, and legitimacy of effectuating the right of the child to free primary education in an affordable way.

⁹⁰ <http://www.nigeriarights.gov.ng/> accessed on 24August 2013.

⁹¹ Survey was carried out in 2005 by Odinkanlu..culled from; Odinkanlu, Chidi. 'The Impact of Economic and Social Rights in Nigeria, in; Courting Social Justice. Judicial enforcement of Social & Economic Rights in Developing World', eds; Varun Gauri & Daneil Brinks,

5.5 The Nigerian Educational Administrative / Management Framework

5.5.1 The Federal Ministry of Education

The Federal Ministry of Education (FME) is responsible for formulating the national policy on education, which guides the nation in pursuit of its educational goals. Statutorily it is at the apex of the regulation and management of education in the country. It is the responsibility of the Federal Ministry of Education to determine policy across all sub-sectors of education. The public education administration system of Nigeria is a decentralised system of governance that transfers power from the FME to the State Ministry of Education (SME). The Federal Government through the FME published the National Policy on Education. The National Policy on Education was enacted in 1977 and has undergone several revisions, the most recent one in 2004. The National policy on Education deals with all aspects of education from its philosophy, different levels and structure, financing, types of education to educational services, administration and planning of education. The policy laid down certain expectations as to quality of educational outcomes. As shown in the foregoing, the Policy laid down certain expectations as to providing free and compulsory primary education which is of quality standard and will enhance the educational standard in the country, but just like most good policies made in Nigeria, there is the problem of enforcement and implementation as it is not a legally binding document. Most policy objectives set out in the past have not been achieved to date and this has made the general public to lose confidence in the educational delivery system. However, a number of difficulties were outlined by Sofolahan in the attainment of these outcomes. These include weak legislation, unstable polity, interference and undue extensions of tenure to achieve objectives. There are also lack of regulation and monitoring, poor manpower for development and capacity building in the education sector and possibility of non-sustainability.⁹²

Another main responsibility of the FME is collecting and collating data for the purposes of educational planning and financing which is done by the Planning, Research and Statistics (PRS) Department. Research conducted by Orbach shows that the Planning, Research and Statistics (PRS) Department have poor level of staffing and resources.⁹³ He gave an example that in 2001 there was only 100 staff deployed to PRS Department of the FME out of a total

⁹² Sofolahan, J. 'National Policy Review Issues' in: R. Akpofure (ed) *The State of Education in Nigeria*. (Abuja: UNESCO Abuja Office 1998) pp3-9.

⁹³ Orbach, E. 'The capacity of the Nigerian Government to deliver basic education services', *Africa Region Human Development Working Paper Series No. 61*. (Washington, DC: World Bank. 2003).

strength of 31,883 and 1,473 in Administration.⁹⁴ As a result, there is dearth of reliable information on schools as the department has had difficulties in collecting reliable statistics. This confirms Sofolahan's claim that one of the greatest administrative obstacles to achieving the set goals of the National Policy on Education has been the use of inadequate or unreliable data in the making of major policy decisions.⁹⁵ In a child-rights- based education, there is need for collection, dissemination and access to information. The data must be; reliable, sufficient and disaggregated covering the whole period of primary education and must be nationally coordinated. The disaggregation of data will be helpful in revealing the gaps in the realisation of free primary education for children in Nigeria. The necessity to gather reliable data is supported by Kasper in her statement that 'applying the tenets of the CRC requires disaggregation of national data by age, gender and ethnic background so that the vulnerable group will be identified and policies developed'.⁹⁶ The non-availability of these statistics can be traced to the following factors; misunderstanding of the concept of gender, poor funding, lack of awareness of the need for gender disaggregation, non-mainstreaming of gender issues and concerns into data collection instruments.⁹⁷ The most challenging of data production in the country, however, is the issue of capacity. Many agencies are yet to have their staff trained in this important area of statistics. There is also lack of equipment and enabling structures for disaggregated statistics production. This requires urgent attention because non-availability of reliable and comprehensive disaggregated statistics will lead to exclusion of gender issues in the formulation and implementation process of policies and programmes on education.

5.5.2 Educational Expenditure in Nigeria

This section aims to shed light on the effectiveness of educational expenditures by examining the effect of public educational expenditures as a percentage of gross domestic products (GDP) on school enrolment, specifically the adequacy of the public education expenditures on primary education enrolment in Nigeria. In order to do this, questions concerning primary education financing in Nigeria are considered. First, how much is available for primary education? Second, who is providing the resources? Third, how are the available resources

⁹⁴ *Ibid*

⁹⁵ Sofolahan, note 92 pp 8 &9.

⁹⁶ Kasper, J., 'The Relevance of U.S. Ratification of the CRC for Child Health, (2010) No 89, Volume 5 *Child Welfare* p.27.

⁹⁷ Nigeria's 5th Periodic Country Report: - 2011-2014 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria, June 2014, p.25, available: <http://www.achpr.org/states/nigeria/reports/5th-2011-2014/> [accessed 12th February 2015].

allocated and, fourth, for what purposes are the resources to be used? These questions are addressed by examining key indicators for Nigeria in both a historical and internationally comparative perspective.

To answer the first question, it is necessary to know how much and what resources are available for educational development. The most common indicators for addressing this question are public education expenditure as a percentage of total government expenditure and as a percentage of GDP. According to a 2002 survey conducted by Hinchliffe,⁹⁸ among the findings were that in 1962, - 50 % of total public expenditures on education were allocated to primary education, 31 % to secondary and 19 % to tertiary.⁹⁹ Education expenditures were 15 % of total Federal expenditures and 21 %, 27 % and 29 % of the total expenditures of the Northern, Eastern and Western Regional Governments respectively. As analysed in the last chapter, expenditure on education suffered a large decline in real terms in the second half of the 1980s as a result of the sharp fall in oil earnings at the time. Education allocation as a percentage of total budgets ranged from 9.88% in 1986.¹⁰⁰ Between 1999 and 2013, Federal Government Allocation to Education Sector 11.2% and 8.7% respectively, Federal Government expenditures on education presently is below 10 % of its overall expenditures.¹⁰¹ Overall, tertiary education sub-sector has received between 68 % of the total federal expenditures for education, while allocation for primary education has been below tertiary and secondary. Adebisi and Oladele described the funding of education in Nigeria as follows, 'the budgetary allocations to the formal education system also have the shape of an inverted pyramid in which secondary and tertiary education receives more than four times as much public resources as primary education.'¹⁰² As such, it is very obvious that primary education is underfunded.

In the National Budget, social services have consistently received poor budgetary allocations when compared with other sectors.¹⁰³ It is noteworthy that in the period 1997-2002, the Federal Government's expenditure on education was below 12% of its overall expenditure,

⁹⁸ Hinchliffe, Keith, 'Public Expenditure on Education in Nigeria: Issues, Estimates and some Implications', *Africa Region Human Development Working Paper Series*, Human Development Sector Africa Region, (The World Bank 2002).

⁹⁹ Nigeria's 5th Periodic Country Report: - 2011-2014 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria, June 2014, note 90. p. 25.

¹⁰⁰ Amangionyeodiwe, L.A., Osinubi, T.S. 'The Nigerian Educational Systems and Returns to Education', (2006) Vol.3 (1) *International Journal of Applied Econometrics and Quantitative Studies*, p. 31.

¹⁰¹ *Ibid* p 34

¹⁰² Adebisi, M.A & Oladele, O., Public Education Expenditure and Defence Spending in Nigeria: An Empirical Investigation available ; <http://www.saga.cornell.edu/saga/educconf/adebiyi.pdf> accessed 25 March 2014

¹⁰³ *Ibid*

the trend being largely downward.¹⁰⁴ From available data, education expenditure represents from 6.71 percent in 1981 to 3.88 percent in 2005 of total government spending.¹⁰⁵ As a means of comparison, both Ghana and Kenya allocate an average of 20 percent of their total expenditure to education.¹⁰⁶

Article 4 of the CRC places obligation on the state as follows:

With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.’ The share of education expenditure in total government expenditure indicates how committed a country is to educational development especially when considered in light of the country’s GDP.

In response to the second question, funds for all three tiers of government are sourced largely from a pooled account, called the Federation Account which is sourced mainly from federal taxes (especially oil and gas) and import duties.¹⁰⁷ The main sources of funds that the Nigerian government has are federal taxes and duties on petroleum, profits, imports and exports, which form the revenue of the Federation Account, and the centrally collected value added tax (VAT) which was introduced in 1976.¹⁰⁸ The Educational Trust Fund (ETF) is a trust fund established by decree in 1993 (amended by Act 40 of 1998) with the objective of using funding, combined with project management, to improve the quality of education in Nigeria. All corporations and companies of identified minimum operating capacity and registered in Nigeria contribute a levy of 2% of their annual assessable profits to the Fund which complements Federal, State and Local Government budgets for the three levels of education nationwide.¹⁰⁹ Therefore considerable attention has been given in Nigeria, to greater use of corporate, community and household sources of finance for education. Primary education is funded by local governments from their Federation Account allocation.¹¹⁰ Primary education is the responsibility of States and their Local Governments.¹¹¹ States

¹⁰⁴ Nigeria’s 5th Periodic Country Report: - 2011-2014 on the Implementation of the African Charter on Human and Peoples’ Rights in Nigeria, June 2014, note 97.

¹⁰⁵ *Ibid*, see also CBN Statistical Bulletin, 1999 and 2005.

¹⁰⁶ Editorial, in; ‘Africa- Asia University Dialogue for Basic Education Development’, (2008) Vol 11, No 3 December *Journal of International Cooperation in Education*, p5.

¹⁰⁷ UNESCO *National Education Support Strategy (UNESS) for Nigeria. 2006-2015*, ED/ESB/EPS/2008/UNESS/NGA/H/1, (Abuja: UNESCO 2008)

¹⁰⁸ Hinchliffe, note 98, p.4.

¹⁰⁹ *Ibid* p.5

¹¹⁰ *Ibid* p.24

¹¹¹ Sections 7(5), 12 (2) & Fourth Schedule, item (2) (a) of the 1999 Constitution stipulates that the functions of local government council in the government of a state shall include the provision and maintenance of primary, adult and vocational education

receive about 40% of public education expenditure. In addition, a grant of N50 (\$0.25) per pupil is allocated for educational materials and other recurrent items by the Federal Government.¹¹² While it is important to know how education expenditure is allocated across levels of education, it is crucial to examine on what the resources are being spent. Education expenditure can be divided into two large categories, current and capital expenditure. The former refers to expenditure associated with annually used and consumed items, while the latter refers to expenditure on items that can be used over a longer period of time.¹¹³ Current expenditure can be divided into salaries and non-salary current expenditure. Teacher salaries are commonly the main current expenditure item as well as support personnel in schools, and salaries of central and local administrative personnel. Non-salary current expenditure covers the rest of the operating costs, which include teaching and learning materials, operating costs of schools, transportation costs; Capital expenditure includes school construction.¹¹⁴ State governments are supposed to receive direct allocations from the Federation Account for funding primary schools in their areas of jurisdiction.¹¹⁵ As a result, the jurisdiction of the Federal Government with regard to primary education has ceased to cover special financing through first line charge allocation.¹¹⁶ The Supreme Court of Nigeria has ruled that:

[...] once the Federation Account is divided amongst the three tiers of government, the State Governments collectively become the absolute owners of the share that is allocated to them [...] So that it would normally be their prerogative to exercise full control over the share. Consequently, it will not be appropriate for the Federal Government to administer the share without the authorisation of the State Governments.¹¹⁷

The *ratio decendi* of this judgment is based on the decentralisation of the education system as stipulated in the constitution. Decentralization entails devolving the responsibility and the operations of the educational system from the federal government to subsidiary levels of government, such as states and municipalities.¹¹⁸ There have been arguments in support and against decentralisation for education. Advocates of decentralisation state as follows: ‘... decentralisation of education strengthens direct involvement and participation of parents and

¹¹² Hinchcliffe, note 98, p.6

¹¹³ UNESCO Institute of Statistics, ‘Financing Education in Sub-Saharan Africa: Meeting the Challenges of Expansion Equity and Quality’, (Quebec: UNESCO 2011), p. 36

¹¹⁴ *Ibid*

¹¹⁵ *AG of the Federation V. AG of Abia State & 36 Others* (2002) 6 NWLR 673

¹¹⁶ *Ibid*

¹¹⁷ *Ibid*.

¹¹⁸ Alexander, N, ‘Paying for Education: How the World Bank and the International Monetary Fund Influence Education in Developing Countries’, (2001) 76(3&4) *Peabody Journal of Education*, 285–338 at 314

community groups. It was conceived as a way to expand access to education for children in remote rural areas'.¹¹⁹ According to UNICEF's findings on Brazil, decentralisation shifted responsibility for decision making from the state capital to school boards headed by an elected principal and composed of equal numbers of parent representatives and school staff. Educational standards have improved, and dropout and repetition rates have dramatically declined.¹²⁰ It is believed that greater responsibility on the part of parents, teachers, and school administrators would result in greater accountability, which would raise school achievement.¹²¹ Local governments are said to be better than national governments at recognising the needs and preferences of local residents, and local residents may find it easier to hold accountable local, as opposed to national, officials.¹²² The arguments against decentralisation as highlighted by Alexander are as follows; first, the federal government's responsibility for oversight and supervision can diminish when functions are devolved to lower levels of government. Second, many localities lack the capacity or the resources to implement decentralized education programs. Third, in addition, many localities become overloaded as the federal or state government devolves an increasing number of responsibilities. Fourth, decentralisation cannot increase equity unless state and local governments are equitable and transparent and possess adequate resources for expanding access to schools, especially by children from low-income families. Lastly, it is difficult to monitor and evaluate decentralization efforts.¹²³

In Nigeria, the educational system is decentralised as stipulated under the constitution, but some have argued that the current system of paying teachers' salaries have resulted in irregular and sporadic payments.¹²⁴ In response, Orbach argues that the Supreme Court judgment could be used to develop the managerial capacity of State Governments and to promote a more integrated planning of education at state level.¹²⁵ At the same time, devolution of national authorities will reduce concentration of power at the centre and

¹¹⁹ World Bank, 1998b (report on El Salvador).

¹²⁰ UNICEF 'The State of World Children (Special Edition)' *Celebrating 20 years of the Convention on the Rights of the Child* (New York: UNICEF 2009) p.29

¹²¹ Alexander, note 118, p.315

¹²² Burki ,S, J., & Perry,G.E., *Beyond the Washington Consensus: World Bank Latin American and Caribbean Studies*, (Washington DC:World Bank, 1998), p. 81 available at <http://dx.doi.org/10.1596/0-8213-4282-7> accessed on 5 August 2014

¹²³ Alexander note 118, p.316.

¹²⁴ Francis, P., et al. 'Hard lessons: Primary Schools, Community and Social Capital in Nigeria' *World Bank Technical Paper No 420 Africa Region Series* (Washington, D.C: World Bank 1998). Available at <http://documents.worldbank.org/curated/en/1998/10/10531789/hard-lessons-primary-schools-community-social-capital-nigeria> accessed on 5 August 2014.

¹²⁵ Orbach, note 93.

therefore prevent its arbitrary exercise. This means that both Federal and state governments can participate at all levels of education.

Past experiences have shown that Local Government Councils were incapable of operating the primary schools effectively and efficiently to guarantee free, universal and quality education to all primary school age children and that there is the need for the intervention of the Federal Government with funds, supervision and control.¹²⁶ The share of non-salary spending in current expenditure is sometimes regarded as an indication of the quality of education, because it is associated with textbooks and other learning materials. The responsibility for school construction and maintenance lies with local governments.¹²⁷

Information about local government expenditures is often inadequate; the public has little information on use of primary education funds available to schools.¹²⁸ The argument against decentralisation is that with decentralisation, charges would be introduced by local authorities or schools and such charges will be justified by calling them *community participation*. They are usually triggered by insufficient funding for education by the central government. A child that is unable to pay will most likely be sent out of school. It is submitted that the issue of decentralisation is influenced by the World Bank and IMF as part of their conditionalities. Decentralisation has often been included as a policy prescription in World Bank and International Monetary Fund loan and credit packages especially in the education sector.¹²⁹ This is evidenced by Katarina¹³⁰ in her observation that: ‘...A statement that the World Bank “opposes user fees for primary education” acknowledged the inevitable economic exclusion of the poor ,...but charges were to be opposed only where levied by the central government, not by local authorities or schools’.¹³¹ In situations where there are insufficient financial resources, and a lack of accountability mechanisms, ultimately, the community and parents will be levied to defray costs. Those who are too poor to afford the cost nevertheless have to pay it. A case could however be made for limited decentralisation and some centralisation by the central government to create uniformity in the states, enable monitoring, and demand accountability on the part of the states and the local government.

¹²⁶ Federal Ministry of Education, *Education Sector Report 2003*, (Abuja: FME2003) p.13. See also *The State of Education in Nigeria*. (Abuja: UNESCO Abuja Office 1998) p.23.

¹²⁷ Fourth Schedule, Item 2(a) 1999 Constitution of Nigeria provides as follows: The function of a local government council shall include... (a) The provision and maintenance of primary, adult and vocational education.

¹²⁸ *Ibid*

¹²⁹ Alexander, note 118, p. 330.

¹³⁰ Tomasevski, *The State of the Right to Education Worldwide Free or Fee: 2006 Global Report*, p.4

¹³¹ World Bank ‘The World Bank and User Fees in Health, Education and Water’, *World Bank Issue Brief*, September 2001.

Financing education appears to have become a heavy burden on government and thus requires participation from other stakeholders. A comparative analysis of legal framework for financing education would provide new perspectives for resource mobilisation for implementing free primary education. It is important for countries to exchange their experience and approaches as regards investment in education, and disseminate best practices, based on a legal framework for financing education. This is the essence of the comparison analysis discussed in chapter six of the thesis.

Government funding is often complemented by inputs from external partners. Hence, there is the need for cooperative participation among stakeholders in the education sector, e.g. entering into partnership with Development Partners, such as the World Bank, IMF, UNDP, UNICEF, UNESCO and the organised private sector, non-governmental agencies as well as other philanthropic organizations and individuals. Such cooperation is accommodately within the provisions of Article 2 of ICESCR, which obligates State parties as follows;

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.

In the CESCR's General Comment No 11, the Committee calls upon the relevant international agencies to assist States parties to the greatest extent possible to meet their obligations on an urgent basis.¹³² Similarly, CESCR in General Comment No. 13 on right to education (Article 13 of the Covenant),¹³³ stipulates that:

Co-ordinated efforts for the realization of the right to education should be maintained to improve coherence and interaction among all the actors concerned, including the various components of civil society. UNESCO, the United Nations Development Programme, UNICEF, ILO, the World Bank, the regional development banks, the International Monetary Fund and other relevant bodies within the United Nations system should enhance their co-operation for the implementation of the right to education at the national level, with due respect to their specific mandates, and building on their respective expertise. In particular, the international financial institutions, notably the World Bank and IMF, should pay greater

¹³² CESCR, *General Comment No. 11: Plans of Action for Primary Education* para.11

¹³³ CESCR, *General Comment No. 13*. Part III of this General Comment entitled "Obligation of Actors other than State Parties" attaches special importance to "the role of the United Nations agencies, including at the country level through the United Nations Development Assistance Framework (UNDAF)", paragraph 56

attention to the protection of the right to education in their lending policies, credit agreements, structural adjustment programmes and measures taken in response to the debt crisis.¹³⁴

A major source of financial and other assistance to education in Nigeria is the international donor agencies, both multilateral and bilateral. Of the assistance provided by these agencies over the past decade, that of the World Bank has been quantitatively the most significant. Major international partners supporting education in Nigeria are: DfID, USAID, JICA, The World Bank, UNICEF and Action Aid. Annexure at the end of the thesis is the list of some major development partner agencies supporting education, as well as their thematic and geographical areas of interventions. The financial support of the IDPs in funding of UBE programme in Nigeria has been discussed in chapter four of the thesis. Nonetheless, it is important to highlight, in particular, the most current support of Education Sector Support in Nigeria (ESSPIN). It is a project funded by DFID. ESSPIN aims at transforming the management and funding of basic education in Nigeria and is introducing a range of improvements to the quality of learning and management of schools to benefit Nigeria's children. It is concentrating its work in six states in the country namely; Enugu, Jigawa, Kaduna, Kano, Kwara and Lagos working at the community level. One of the most striking highlights from the ESSPIN research, however, was the willingness and readiness of communities to take action and demand their rights in relation to education if they were provided with opportunities for dialogue, learning and support.¹³⁵ ESSPIN reports that from their study, this kind of cooperation they received from the community had been almost entirely missing from many schools in Nigeria.¹³⁶ The communities now see the school as 'their own' and are willingly contributing to it through the existence of a functional School Management Board.¹³⁷

The state of primary education in Nigeria was also a concern to the Members of Parliament (MP) in the UK. From 11 – 18 February 2012, UK Parliamentarians visited Nigeria to gain insight into Nigeria's education system and the impact it has on the country's development. This delegation looked at the achievement so far and the further challenges Nigeria faces to improve its basic education provision and place into educational institutions 8.6 million out of school children, and what the UK Government is doing to support the effort to achieve education for all, in line with MDG 2, by 2015. Some of the recommendations that emerged

¹³⁴ *Ibid*, paragraph 60.

¹³⁵ Education Sector Support Programme in Nigeria (ESSPIN) Report Number: ESSPIN 12, May 2009. Available at www.esspin.org/resources/reports accessed on 26 June 2013.

¹³⁶ *Ibid*

¹³⁷ *Ibid*

from the delegation were that: DFID Nigeria should support Nigerian authorities to take their full role in ensuring reliable and transparent financing for free basic education. DFID Nigeria should work with the Federal Government's Universal Basic Education Commission and State and Local-level authorities to ensure that School-Based Management Committees receive appropriate capacity-building and resource support to be able to effectively function and advocate on behalf of their communities and students. DFID Nigeria should continue to work with State Governments to raise standards in pre- and in-service teacher training, including through ESSPIN.¹³⁸ Doubtless, there are obstacles but they are not insurmountable, and the children in Nigeria are eager to receive primary education at any opportunity.

5.5.3 The Education (National Minimum Standards and Establishment of Institutions) Act

The decline in quality of education in Nigeria has been a major concern due to rapid increase in students' numbers without comparable expansion in resources, staff and facilities.

Government acknowledged that as part of improving quality in educational institutions a minimum standard must be set. The Educational National Minimum Standards and Establishment of Institutions Act No 16 of 1985, together with the 1999 Constitution¹³⁹ empowers the Minister of Education to ensure that minimum standards are set, maintained and constantly improved in all schools of the federation. This responsibility, aimed at ensuring uniformity of standards is delegated to the Federal Inspectorate Service (FIS) Department and other bodies by the Minister of Education and carried out through inspection and monitoring of educational provisions in schools and colleges. The Act also imposed penalties for any contravention of its provisions. The enactment of the Act is one of the government initiatives to reform the education system.

The Act provides that the responsibility for the establishment and maintenance of minimum standards in primary schools is vested in the Minister of Education.¹⁴⁰ This is supposed to reduce disparities between Northern and the Southern regions evident in the delivery of teaching and learning resources. There are also disparities between urban and rural schools, and between public and private education institutions. The system reflects differentiation, so there is need to set a minimum standard, and an institution that falls below the standard should invite attention for improvement.

¹³⁸ www.parliament.uk/Reports/AppG-Global-Education-for-All-Nigeria accessed on 26 June 2013.

¹³⁹ Second Schedule, Part I, Item 60(e) 1999 Constitution of Nigeria.

¹³⁴ Section 1 Educational (National Minimum Standards and Establishment of Institutions) Act (No.16 of 1985) Vol 5 (2004) LFN.

5.6 Conclusion

The CRA incorporates the right of the child to free and compulsory universal primary education and some of the important principles contained in the CRC and the ACRWC. However, the CRA does not obviate the need for the substantive right of children to education to be included in the proposed new Constitution. Free compulsory primary education is currently provided for in the CRA and the UBE Act but not in the central body of legislation governing the provision of education in Nigeria- the Constitution. As Nigeria is currently considering redrafting its constitution steps should be taken to ensure that the right to free and compulsory basic education is formalized as a fundamental right in the constitution. The judiciary needs to penetrate social relations realizing that people's most basic demands can be met through the rule of law. The Indian experience is informative because it provides hopeful facts with regards to overcoming constitutional barrier to enforce the right to education.¹⁴¹ This is of particular relevance to Nigeria.

The passing of the law is just the first part of the process. The second part which is implementation requires a lot of orchestrated change. Words on paper alone do little justice to the aspirations inherent in these documents; the rights they contain must be humanised. In addition, it remains essential for the international development partners to meet up to their promises for educational development assistance and to make such aid effective and predictable.

In chapter six of this thesis, a comparative study of the children laws and implementation of right to education in Kenya and Ghana will be undertaken in relation to the Nigerian situations addressed in this chapter. From these case studies, examples of good practices and successful policies will be highlighted and recommendations for Nigeria will be given.

¹⁴¹ *Unni Krishna J.P. v. State of Andhra Pradesh*, 1993 SC 2178 & *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.C. 666 at 667. The court gave a broad interpretation to right to life in combination with education as a fundamental right needed to live a life in dignity. This resulted in India's 86th Constitutional Amendment in 2002.

Chapter Six

Comparative Analysis of the Implementation of Free and Compulsory Primary Education in Nigeria with the Implementation in Ghana and Kenya

6.1 Introduction

In chapters four and five, the educational system and the legal framework and policies regarding free and compulsory primary education in Nigeria were analysed and critically examined. This chapter comparatively evaluates the situation of Nigeria with the implementation of free and compulsory primary education in two other African states. In order to evaluate a country's preparedness to realise the right to free primary education of its children, comparisons can be made with countries with similar levels of development. This will be helpful in making a distinction between a country's inability or its unwillingness to realise the right to education for its children. This chapter makes use of several relevant comparative factors including the existing legal frameworks, statutory provisions and institutional mechanisms undertaken in Ghana and Kenya for the effective implementation of free and compulsory primary education in those two states. This will enable comparison with the situation in Nigeria as previously examined in the last two chapters. All three countries belong to sub-Saharan Africa, and were former British colonies and so they all have a predominant British influence in their educational structures. So pervasive was the influence of the colonialists that the legislations of all the three countries are strongly informed by British laws as will be expatiated later. Arguing from a socio-legal and law-in-context approach, the chapter will, with reference to the Ghanaian and Kenyan approaches, propose a framework for the abolition of school fees to make compulsory primary education possible for children in Nigeria.

The chapter will use the comparative experiences of Ghana and Kenya to answer the following questions: What are the challenges faced when school fees are discontinued? What are the options for overcoming these challenges in a sustainable manner? How did Ghana and Kenya go about developing and implementing their free primary education policies, and what are the outcomes? What practical lessons can Nigeria draw from the experiences of these two countries? The common variations in their constitutions will be highlighted to show how

each jurisdiction has evolved their approach towards enforcing the human rights to education of children respectively. This chapter draws from those experiences to explain the value of free primary education programme as a policy measure that helps maintain the momentum toward universal primary education, as well as to identify the potential pitfalls and challenges associated with its use. It provides a comparative overview of the national experiences of Nigeria presented in chapters four and five.

The chapter is organised as follows: the next section examines the path that education has taken in Ghana and Kenya starting from the time of the missionaries, the colonialists, up to the independence and post independent era. It is followed by an analysis of the re-launch of free primary education in both countries. Next, the legal framework of the right to education, the national laws and policies on primary education in the two countries are examined, followed by an analysis of the reports submitted to the CRC Committee by the two countries and the Concluding Observations of the Committee. The chapter concludes with a summary of the lessons to be learnt from the experiences of the two countries and recommendations are made.

6.2 Background of the Educational Systems in Ghana and Kenya

This background is prerequisite to understanding the full impact of the British educational system on the countries of comparison. Furthermore, analysis of the past is important to understanding the present. ‘If we ignore the past, we cannot understand the present, nor forecast the future.’¹ Political organisation and systems of governance, as well as the social organisation and economic situation of countries, have a bearing on their capacity and efforts to fulfil treaty obligations. The countries examined in this chapter have witnessed significant changes in their political, social and economic systems, through a period of colonisation and decolonisation. Their post-independence histories have often been synonymous with political instability, internal conflict and violence. The transitions to market economic policies also have posed new challenges to social and economic arrangements that have a bearing on education in the two countries (Ghana and Kenya); Nigeria too shares similar experiences.

¹ Ochiagha, G. O., *A History of Education in Eastern Nigeria to 1960*, (Washington D.C: The Catholic University of America 1965), p.12.

6.2.1 Ghana

The country under British Colony formerly called Gold Coast and renamed Ghana upon independence in 1957. Ghana has experienced a similar legal and political evolution from colonial to military and civilian democratic governance as Nigeria. The country's educational development has followed a similar pattern with that of Nigeria; beginning with the educational activities of the Christian missionaries as early as the eighteenth century.

6.2.1.1 Period of the Christian Missionaries Activities

Christian missionaries were said to have introduced western-style education into Ghana as early as 1765.² Many of these institutions, established by Presbyterian and Methodist missionaries, were located in the south of the country in what was the British Gold Coast Colony, the modern day Ghana. The main aim of these early schools was to facilitate the training of the local inhabitants as interpreters for purposes of trade and to convert Ghanaians to the Christian religion.³ Thus, the curriculum had a narrow focus on basic literacy with the Bible and scripture as the main texts of schooling. The missionaries played an important role in establishing an education network in Ghana as they convinced the Chiefs of Ghana in 1832 to send their children to the government school, thus creating acceptance for formal education. Pupils were made to pay because the missionaries were faced with the challenge of inadequate funding.⁴

6.2.1.2 Education during the Colonial Era

In 1918, the first targets for the development of education were set by Sir. Hugh Clifford, aimed to provide primary education for every African boy and girl, establish a Training College for teachers in every province, and pay better salaries for teachers. Great strides were made on the education front from 1922 till 1938. The Second World War affected the progress of education as all the European personnel were mobilized for war. By the 1950s, there were approximately 3000 primary and secondary schools in the Gold Coast.⁵ Primary education then underwent a rapid and steady growth and the number of schools rose from

² Antwi, M.K., *Education, Society and Development in Ghana*, (Accra: Unimax Publishers Ltd 1991) p.10.

³ Graham C.J., *The History of Education in Ghana from the earliest Times to the Declaration of Independence*, (London: Frank Cass 1971) p.5

⁴ *ibid*, see also; McWilliam, H.O., and P.M. Kwamena-Poh, *The development of education in Ghana: An outline*. (London: Longman 1975).

⁵ Isahaku, S. (2009) An analysis of dominant and alternative approaches to education reform in Sub-Saharan Africa: the case of Ghana, PhD thesis, Trondheim, Norwegian University of Sciences and Technology Management available at; <http://www.diva-portal.org/smash/get/diva2:287583/FULLTEXT01.pdf> accessed 24 April 2014.

1,081 in 1951 to 3,372 in 1952.⁶ Enrolment doubled in a period of five years and the Gold Coast was acclaimed as having the most developed education system in Africa.⁷ The Gold Coast in the 1950s was a country with the highest level of education in the whole of Sub-Saharan Africa.⁸ The country supplied many of the civil servants working in Nigeria. The British had laid a solid foundation for the formal education system in Ghana, however only a small group had access to it because it was not free.⁹

6.2.1.3 Education in the Independence and Post-Independence Eras

After Ghana gained independence from British Colonial rule on March 6, 1957, education remained a high priority on Dr. Kwame Nkrumah's government's agenda. There were policies on free compulsory basic education from the beginning and the creation of local education authorities with responsibilities for buildings, equipment and maintenance grants for primary schools.¹⁰ There was a dramatic increase in the number of elementary and secondary schools during the regime of Nkrumah. President Nkrumah, initiated the Education Act 1961 (Act 87), aimed at achieving Free Universal Primary Education in Ghana. Three things of significance are worth highlighting in the provisions of the Act: first, the Act established Local Education Authorities within Local Authorities and entrusted them with the responsibility, among other things, to maintain all schools in their areas. Thus the establishment of public basic schools henceforth became the responsibility of the local authorities only. As can be seen, through this provision, responsibility and operation of the primary educational system devolved from the federal government to the municipalities. This shows that decentralisation had been in operation since the early sixties in Ghana even before it was introduced by the World Bank. The second important feature of the 1961 Act was the fact that it made education compulsory, with Section 2(1) stating that, "Every child who has attained the school-going age as determined by the Minister shall attend a course of instruction as laid down by the Minister in a school recognised for the purpose by the Minister." The word 'shall' denotes compulsion so, it can be deduced that the Act makes primary education compulsory. A third equally important aspect of this Act was its provision for tuition-free education, with Section 20(2) stipulating that "No fee, other than the payment

⁶ Scadding H., 'Junior Secondary School: An Educational Initiative in Ghana', (1989)19 (1) *Compare*, pp.43-48.

⁷ Foster, *Education and Social Change in Ghana*, Chicago, University of Chicago Press, 1965.

⁸ BBC World Service, *The Story of Africa (Africa History from the Dawn of Time)*, available on: http://www.bbc.co.uk/worldservice/specials/1624_story_of_africa/page5.shtml accessed on 12 March 2014.

⁹ Isahaku note 5 p.35.

¹⁰ Little, Angel, 'Access to Basic Education in Ghana: Politics, Policies and Progress', *Create Pathways to Access, Research Monograph No. 42* (University of Sussex: CREATE 2010) p.7.

for the provision of essential books or stationery or materials required by pupils for use in practical work, shall be charged in respect of tuition at a public primary, middle or special school." In sum, from the aforementioned, the 1961 Education Act, (Act 87) made primary education tuition-free and compulsory. The inference is that the Act made education compulsory, but it could not be said that education was fully free because even though tuition was free, parents were still responsible for their children's books and school materials. Also from the Act the administration of education became decentralised and not the monopoly of the central government. The 1961 Education Act gave the responsibility for expanding primary education to local education authorities; this resulted in the rapid expansion of access to education to primary education.¹¹ At independence, Ghana's economy was very strong.¹² By the end of the 1970s, there was a dramatic decline in the economy of the country, culminating in a situation in which Ghana's foreign debt placed it in the category of one of the highly indebted poor countries in Africa,¹³ which had adverse effect on the educational system.

6.2.1.4 Education during the Period of Political Instability

Ghana's education was then described as 'decayed in need of organic rejuvenation'.¹⁴ The decay was a result of political instability with its resulting poor management, corruption, and general macroeconomic turmoil.¹⁵ This second phase of educational development in Ghana's political history, (1974- 1983) was characterised by instability in governance as a result of successive military takeovers. This political instability coupled with the rise in global oil prices in the early 1970s resulted in economic decline in the country. It was a period of harsh and repressive revolutionary zeal on the part of the military regime of 1981 and resulted in a significant number of trained and highly qualified teachers leaving the country.¹⁶ Education was therefore affected by political instability, ad hoc measures, and frequent changes in education policy. Teaching and learning in basic schools had deteriorated to the extent that majority of school leavers were semi-illiterate, and confidence in Ghana's once enviable education system deteriorated.¹⁷

¹¹ Foster, P. *Education and Social Change in Ghana*, (London: Routledge and Paul Kegan 1965) p 32.

¹² Little, note 10, p.9.

¹³ Little, note 10, p.10.

¹⁴ Akyeampong, 'Revisiting Free Compulsory Universal Basic Education (FCUBE) in Ghana' note 17, p.178.

¹⁵ *Ibid*

¹⁶ Nti, J. *Ministry of Education- Report of Consultancy on Organisation and Institutional Analysis*. (Accra, Ghana: Ministry of Education 1999).

¹⁷ Mc Williams & Kwamena-Poh, *The Development of Education in Ghana*, (London: Longman, 1975) p.100.

The quality of basic education which had been high pre 1974 began to decline as a result of poor national economy which led to mass exodus of Ghanaian teachers leaving for neighboring oil-rich Nigeria where they could get higher wages compared to what they could earn as teachers in Ghana then. At the same time educational infrastructure and facilities worsened for lack of funding.¹⁸ Poor supervision and ineffective management of schools also led to further deterioration in the quality of education.¹⁹

As school quality declined, the returns plummeted, causing demand for schooling especially among the poor to fall sharply.²⁰ By the mid-1980s, Ghana's educational system was in sharp decline following a period of protracted poor economic performance in the 1980s. From Little's assessment, Ghana's education system had deteriorated in quality; enrolment rates stagnated and the percentage of Gross Domestic Product (GDP) allocated to education dropped from 6.4% in 1976 to a low of 1.7% in 1983²¹. Government resources were no longer available to construct, complete or even maintain the existing education facilities and the down-turn in the economy resulted in significant fall in the ratio of trained to untrained teachers in the basic education sector.²² Ghana introduced austerity and decentralization measures in 1983, which included the formal introduction of school fees.²³

6.2.1.5 Educational Reforms

In the early eighties, Ghana embarked on a series of IMF structural adjustment programmes under which the government mounted reforms in all social sectors. The Education Sector Adjustment Credit (EdSAC) became operational with the help of development partners, notably the World Bank and the UK DFID- (then the Ministry of Overseas Development - ODM).²⁴ This program was aimed at arresting the decline of the education sector.²⁵ With strong World Bank support, the development of basic education in Ghana received US\$260 million from 1986 to 2002.²⁶ During the period 1984 to 1990, Ghana enjoyed a lot of

¹⁸ World Bank 2004 *Books, building and learning outcomes: An impact evaluation of World Bank support to basic education in Ghana*. Washington DC: Operations Evaluation Department (OED), World Bank.

¹⁹ Kadingdj, Stanislaus 'Policy initiatives for change and innovation in basic education programmes in Ghana' (2004) Vol 4: 2 *Educate* p.6.

²⁰ Glewwe, P. & Ilias, N. 'The Determinants of School Attainment in Sub-Saharan Africa: A Case of Ghana', (1996), 8, no3 *Journal of International Development*, 395-413 at 398.

²¹ Little, note 10, p.12

²² *Ibid.*

²³ *Ibid.*

²⁴ Kadingdj, note 19, p.8

²⁵ Akyeampong,., note 14 p.178

²⁶ World Bank. *Books, building and learning outcomes: An impact evaluation of World Bank support to basic education in Ghana*. (Washington DC: Operations Evaluation Department (OED), World Bank 2004).

goodwill from developed wealthy countries and donor agencies such as the World Bank and the IMF. The reason for this financial support was the 'success story' of Ghana's Economic Recovery Programme of 1983.²⁷ The outcome of the reforms and recovery of the education sector is the FCUBE created in 1996. The Government of Ghana recognises education as the fundamental building block of the country, and realising that a literate citizenry is the foundation of democratic processes, economic growth and social well-being of a nation's population. From world human development rating, Ghana is categorised today as within medium human development nations with a Human Development Index (HDI) ranking of 131.²⁸

6.2.2 Kenya – Historical Background

6.2.2.1 Education under the Missionaries

Similar to Ghana and Nigeria, the foundation for modern education in Kenya was laid by missionaries who introduced education as a means to spread Christianity, teaching practical subjects, such as carpentry and gardening, which were mainly useful around the missions.²⁹ Education was aimed at children and adolescents,³⁰ and many parents opposed it because it took away children from their tribal way of life. The parents did not see any immediate benefits to be gained by sending their children to school when they could be herding cattle or goats or helping in the farm. The period of missionary venture into Kenya coincided with political partition of Africa by the European powers. Thus, as the partition progressed the colonial powers came to rely more on the missionaries to extend their various brands of 'civilisation'. It is improbable that the missionaries could have expanded their educational system without Government financial aid. On its part the administration could not have hoped to staff, manage and supervise these systems without missionary administrative help. It was a symbiotic relationship. The British Government was generally favorably disposed towards the activities of the missions.³¹ Nevertheless, as the Colonial authorities in Kenya and Britain began to take interest in education and the missionaries began to find it increasingly difficult to finance the school systems they had established, a pattern of cooperation developed in which missions came to depend largely on Government financial support while the State

²⁷ Kadingdj, note 19, p.8.

²⁸ Akyeampong, note 14, p.179.

²⁹ Akyeampong, 'Educational Expansion in Ghana: A Review of 50 Years of Challenge and Progress', *Create Pathways to Access, Research Monograph No. 33* (University of Sussex: CREATE 2010), p.22.

³⁰ *Ibid* p.23

³¹ Sheffield, James, *Education in Kenya: An Historical Study*, (Columbia: Columbia University Teachers College Press, 1973), p.5

relied on the missionaries for supervision, management and partial financing of the schools.³² Though meager amounts were collected as fees but pupils were not denied access for non-payment.³³

6.2.2.2 Education under the Colonial Authorities

The colonialists tended to regard all non-whites as 'inferior' to them. It was left to the non-whites to better their position in life and education was seen as the basis of it.³⁴ These racially motivated moves were influential in justifying the establishment of segregated educational systems for Europeans, Asians and Africans. Differential educational treatments were given to these various classes to prepare them for their racially-determined positions in life.

Education for the Africans was directed 'to fit them for services or apprentices'.³⁵ In other words, the purpose of schools for Africans was to keep them in perpetual subjugation to the authority of the ruling colonial masters. The colonial government was interested in and catered for the education of European children. Abreu is of the opinion that it was necessary for the government to provide the maximum educational facilities for European children to prepare them for further education in Britain or South Africa.³⁶

Fees were paid in government schools,³⁷ and any child owing fees may be refused admission into school until all the fees due up to date had been paid.³⁸ Legal proceedings were instituted for the recovery of any fees or other sums due in respect of a pupil at a government school.³⁹ Despite not being free, education was declared as compulsory and it was the duty of parents who have children of school age to ensure their children attended schools.⁴⁰ However, parents who were unable to pay the fees prescribed for tuition under the ordinance were to apply for exemption from the payment of such fees.⁴¹ It is not in order to make education compulsory when it is not free; children from poor backgrounds were certainly not put into consideration.

³² *Ibid*

³³ *Ibid*

³⁴ Abreu, Elsa., *The Role of Self-Help in the Development of Education in Kenya 1900-1973*, (Nairobi: Kenya Literature Bureau, 1982), p.7.

³⁵ *Ibid*, p.35

³⁶ *Ibid*, p.27.

³⁷ S.39(1) Education Ordinance Laws of Kenya 1948

³⁸ S.39(2) Education Ordinance Laws of Kenya 1948

³⁹ S.39(4) Education Ordinance Laws of Kenya 1948

⁴⁰ S.25 Education Ordinance Laws of Kenya 1948

⁴¹ S.26 Education Ordinance Laws of Kenya 1948

6.2.2.3 Education in the Post Independent Era

Upon attaining political independence in 1963, the Government assumed central responsibility for education at all levels by removing various communal and religious bodies who managed the segregated system. The Kenyatta Government (1963-1978) declared in the ruling party's manifestos of 1963 and 1969 that the Government was committed to providing seven years of free primary education. In 1971, a presidential declaration abolished tuition fees for the districts with unfavorable geographical conditions, mainly in the North-Eastern Province.⁴² The education system emphasised national unity, which was encouraged by the removal of racial segregation from the school system

6.2.2.4 Earlier Attempts at Free Primary Education

In 1974, President Kenyatta declared that fees were abolished for all primary school children in classes one to four throughout the country and for the entire primary cycle in 1978.⁴³ During this period primary education enrolment which was 892,000 in 1963 increased to 2,881,000 in 1975. However, despite the abolishment of tuition fees, there were still a number of costs such as uniforms, building funds, equipment levy and activity fee the pupils were expected to pay.

The Moi Government (1978-1992), continued with the free-tuition primary education policy. This could not be sustained because following the implementation of SAP in the 1980s. The government reneged on the reforms recommendation, and parents and communities were required to contribute to their children's schooling. Cost sharing in education was introduced. Parents continued paying tuition, buying books and desks because the government did not have adequate resources. This definitely resulted in a net decrease in primary school enrolment.⁴⁴

Changes in the national policy introduced in the mid-1980s placed more of the cost burden on households.⁴⁵ This meant that parents had to contribute more towards the education of their children through the cost-sharing programme. Many schools were constructed through

⁴² Abreu, note 34 p.60.

⁴³ Somerset, Anthony, 'Universalising Primary Education in Kenya: the Elusive Goal', (2009), Vol. 45, No. 2, *May Comparative Education* 233–250 at 233.

⁴⁴ *Ibid*, at 236

⁴⁵ Vos et al 'Achieving Universal Primary Education: Can Kenya Afford it?' *Economics Working Papers*. Paper 200447, (University of Connecticut: Digital Commons@U Conn, Economic Working Papers, Department of Economics 2004), available at; http://digitalcommomns.uconn.edu/econ_wpapers/2000447 accessed 13 November 2013.

“*Harambees*”⁴⁶ (fundraising efforts) organized by the community. In principle, household contributions were supposed to be voluntary, but in practice, children whose parents did not pay were often suspended.⁴⁷ Enrolment rates began to fall steadily around this time because education costs were a problem for the poor. In sum, at the first attempt of free primary education in Kenya, due to a stagnated economy since the early 1980s, this brought about cost sharing policy which altered free primary education policy in 1989. This policy change resulted in a drop in enrolment by approximately 20% between 1989 and 1995 due to the inability of parents to bear the economic burden of education.⁴⁸ The falling enrolment in the ensuing years was used as opportunity to make free primary education a popular issue in the 2002 election. The incoming Kibaki government followed through on its promise to reintroduce Free Primary Education in 2003. This second attempt at free primary education is discussed and analysed fully in the chapter.

6.3 The Present Free Primary Education Initiatives in Ghana and Kenya.

This section examines the re-introduction of free primary education schemes in Ghana and Kenya. In many African countries, recent efforts to abolish school fees in primary schools are, in fact, second or third attempts. The first efforts were initiated many decades earlier but were abandoned or reversed under pressure of economic crises. As analysed above, in Ghana, for instance, primary school fees were first abolished in 1961, while in Kenya fee abolition policies were initially introduced in 1974. This was similar to experience in Nigeria as was discussed in chapter four. Over time, however, the policies were largely abandoned, and many of the early gains reversed due to inadequate planning and inability to sustain the scheme as a result of economic downturn. Nigeria had a similar experience. It is commendable that Ghana and Kenya have reintroduced fully free primary education policies during the past decade as part of the renewed international effort to achieve universal primary education by 2015.

⁴⁶ ‘*Harambees*’ (literally “pulling together”) the system requires that the parents are to contribute to school construction and maintenance costs.

⁴⁷ Bold et al. ‘Determinants of Educational Achievement in Kenya since the Introduction of FPE’, *Department of Economics Oxford University Working Paper* (Oxford: Oxford University 2010), available at www.iig.ox.ac.uk/ accessed on 13 November 2013.

⁴⁸ Sommerset note 43.

6.3.1 Ghana: Free Compulsory Universal Basic Education (FCUBE)

This part of the chapter examines the design, planning, and implementation of the FCUBE programme embarked on by Ghana in the last twenty years. The FCUBE initiative in Ghana was formally launched in 1996 and enhanced through a Capitation Grant Scheme strategy in 2004/05. The Ministry of Education, Science and Sports (MoESS) has the overall responsibility for policy formulation. The Mission of the MoESS is “to ensure that all Ghanaian children of school-going age are provided with quality formal education and training through effective and efficient resource management that will facilitate the making of education delivery relevant to the manpower and social needs of the nation.”⁴⁹

The FCUBE launched in October 1996 was to be implemented within a ten year period (1996-2005) in fulfilment of the Fourth Republican Constitution’s mandate, which states that; ‘The Government shall [...] draw up the programme for implementation within the following ten years for the provision of Free Compulsory Universal Basic Education’.⁵⁰ It was designed to address some of the shortcomings of previous educational reform initiatives in the country. The first 9 years form the basic education and is free and compulsory. It is wider unlike the former UPE which made only primary education free. The question is; ‘how was the 1996 FCUBE reform policy different from the previous similar education policies?’ According to Kadingj, ‘even though the FCUBE policy was not new in terms of themes and ideas, it was certainly new in the emphasis it placed on its implementation’.⁵¹ By requiring that all children in Ghana receive nine years of free schooling, the Government wished to ensure that all products of the basic education system were prepared for further education and skill training.⁵² The 1996 FCUBE policy sought to expand access to good quality basic education. Specifically, at the heart of FCUBE was the government’s commitment ‘to make schooling from Basic Stage one through nine years of *free and compulsory* for all school-age children by the year 2005 ... [and] to improve the quality of the education services offered’.⁵³ The compulsory part indicates the determination to put pressure on parents to ensure attendance by their children for the full duration of the basic education. Parents were threatened with

⁴⁹ Adamu-Issah, *et al*, *Achieving Universal Primary Education in Ghana by 2015: A Reality or a Dream?*, (New York:UNICEF 2007) p.3.

⁵⁰ Article 38(2) 1992 Constitution of Ghana

⁵¹ Kadingj, note 19, p.9.

⁵² *Ibid*

⁵³ Maikish, Athena & Gershberg, Alec, *Targeting Education Funding to the Poor: Universal Primary Education, Education Decentralization and Local Level Outcomes in Ghana*, (UNESCO Background paper prepared for the Education for All Global Monitoring) (Paris:UNESCO 2009) , p.6. See also Government of Ghana / Ministry of Education, Science and Sports 1996, 1.

finances if they failed to comply, but without an enforcement strategy this is simply an empty threat. Despite an existing policy of fee-free tuition in primary schools post-1996 as outlined by FCUBE, many districts continued to charge students levies to attend school as a means of raising funds to cover school-related expenses.⁵⁴ While theoretically, no child was to be turned away for non-payment of fees, the initiative did not work. This deterred many families, particularly the poorest, from sending their children, especially girls, to school. There was confusion over what 'free education' actually stood for. The Ghana Education Service had to highlight what FCUBE entails as follows;

[...] under FCUBE programme, the government provides free tuition, textbooks and teaching and learning materials and subsidises the cost of exercise books. It also supplements Basic Education Certificate Education (BECE) fees for both public and private candidates ... [but] parents ... are expected to send all their children of school-going age to school, feed them and provide them with school uniforms, school bags, stationery and transport where necessary.⁵⁵

Through what is termed the Capitation Grant Scheme, Ghana embarked on a national initiative for the provision of universal basic education in 2004. Consequently, school fees were completely abolished in 2005.⁵⁶ This initiative sought to bolster the constitution, in which free, compulsory and universal primary education is mandated, and to support its educational policy under FCUBE, which was established as an outgrowth of this constitutional mandate.⁵⁷ In order to meet the MDG goals for education, the Government took the bold step forward by abolishing all fees charged by schools-(pre- primary, primary and junior secondary) and provided schools with a small grant for each pupil enrolled, called the Capitation Grant Scheme (CGS).⁵⁸ Under this system, every public pre-primary, primary school and junior secondary school receives a grant of about \$3.30 per pupil per year. Schools are therefore not permitted to charge any fees to parents. These amounts were chosen based on an analysis of the average fees charged nationwide at the basic education level.

⁵⁴ *Ibid* p2

⁵⁵ Daily Graphic, Friday, November 17, 2000, 19; culled from; Akyeampong, K., 'Revisiting Free Compulsory Universal Basic Education (FCUBE) in Ghana', (2009) 45: 2 *Comparative Education*, 175-195 p.181

⁵⁶ Global Initiative on Out-of-School Children Ghana Country Study available at www.uis.unesco.org/.../out-of-school-children-ghana-country-study-2012 accessed 23July13.

⁵⁷ *Ibid*

⁵⁸ Ministry of Education Science and Sports, *Report on the Education Sector Annual Review (ESAR) 2006*, (Accra: MoESS 2006).

6.3.1.1 The Capitation Grant and its Impact on Free Primary Education in Ghana

The Capitation Grant Scheme was introduced in 2004-2005 to support financially and administratively the FCUBE policy of free, universal basic education. It removed the financial barrier to enrolling in schools while, at the same time, compensated schools for any loss of revenue incurred by eliminating student levies.⁵⁹ These allocations would be accounted for and spent in accordance with the School Performance Improvement Plan (SPIP). The key players in the management of the capitation grant are the District Director of Education (DDE), Assistant Director Supervision, Circuit Supervisors, District Accountant, School Management Committee (SMC), and Head-Teacher.⁶⁰

Mode of disbursement of the grant

To ensure smooth implementation of the school programs, separate bank accounts were opened by the district for each school. The signatories to the school account are the head teacher and the assistant.⁶¹ As done in Kenya, it is submitted that Parent Teacher Associations (PTAs) could be made grant signatories to increase demand for transparency and accountability by actors outside of the formal management structure of schools. To ensure accountability and transparency, each school is to maintain financial records, which document all capitation grants disbursed and received, along with all appropriate receipts and documentation. These records are to be made available for the review of the Schools Management Committee (SMC), the district education office, and the internal audit office. The district education office is also to report on a quarterly basis to the director general on capitation grant operations. It is submitted that there are monitoring, and reporting on the disbursement and use of funds at the districts and schools on a term-by-term basis coupled with review of progress on implementation of the scheme. This is an evidence of transparency and accountability, which is required for successful implementation of the Capitation Grant Scheme (CGS).

Impact of the capitation grant

Capitation Grants had a positive impact on school enrolment-related figures during the 2005/06 school year, whereby gross enrolment rose by nearly 10 per cent, bringing total primary enrolment to 92.4 per cent nationwide, and net Enrolment increased from 62 per cent

⁵⁹ Adamu-Issah, *et al*, note 49, p. 4.

⁶⁰ Ampratwum, Edward & Armah-attoh, Daniel, Tracking Capitation Grant In Public Primary Schools In Ghana), (2010) Volume 10 Number 1, June *Ghana Center for Democratic Development (CDD-GHANA)*, p.12.

⁶¹ *Ibid*

to 69 per cent.⁶² Every region in the country experienced a rise in enrolment, with the Northern Region, where rates were lowest, experiencing the largest increase. Overall enrolment in basic schools increased by 16.7 per cent in the 2005/06 school year compared to 2004/05. Enrolment of girls increased slightly more than that of boys (18.1 per cent vs. 15.3 per cent).⁶³ There was an increase of 147,635 in absolute figures, or 14.6% over the 2003/04 academic year. Overall enrolment rose by an impressive 14.5 per cent; enrolment gains for pre-school were particularly significant (over 36 per cent). . The CGS had a significant impact on boosting school enrolment. This success led to the nationwide adoption of the ‘Capitation Grant’ system in early 2005. A total amount of C/129 billion (US\$14.72 million) was released by the government for the program in its first year of implementation.⁶⁴ The Government of Ghana now spends 40% of its recurrent national budget on education; about 65% of that amount is allocated to primary and junior secondary education.⁶⁵

Funding

Financial sustainability of the CGS is very crucial for the success of the scheme. Since the introduction of the capitation grant, the Government of Ghana proposed to fund the scheme from the Heavily Indebted Poor Countries (HIPC) Initiative and the Social Impact Mitigation Levy Funds. A total amount of C/129 billion (US\$14.72 million) was released by the government for the program in its first year of implementation from the following sources: HIPC Fund, C/ 47.5 billion, or US\$5.40 million, and the Social Impact Mitigation Levy Fund, C/ 82.0 billion or US\$9.32 million.⁶⁶ Subsequent financing was included in the national budget for the year. Ghana has received lots of international donor supports in form of grants and loans. Ghana’s Vision 2020 policy document makes a financial commitment of approximately 40% of GDP to the development of education. Developments Partners working in close collaboration with Government have also committed substantial resources to the Government of Ghana since 2005 when the CGS was launched.⁶⁷ On an annual basis donor contribution constitutes some 9% of the overall education budget and 15% of the

⁶² World Bank & UNICEF, *Abolishing School fees in Africa*, note 95,p.102,

⁶³ Adamu-Issah *et al* note 49, p.4.

⁶⁴ Little, A. note 10 p.31.

⁶⁵ Osei Robert *et al*, *Effects of Capitation Grant on Education Outcomes in Ghana*, (Legon: Institute of Statistical Social and Economic Research University of Ghana,2009) p.5.

⁶⁶ Little, note 10, p.31.

⁶⁷ Maikish A & Gershberg A. 2009, ‘Targeting Education Funding to the Poor: Universal Primary Education, Education Decentralisation and Local Level Outcomes in Ghana’, *Background Paper for the Education for All Global Monitoring Report*, (Paris: UNESCO 2009).

allocations for basic education.⁶⁸ All support programme funded by World Bank, USAID and other donor agencies have been integrated into a single Project Management Unit headed by a Director-General. This facilitates coordination in the disbursement of the grants to guarantee effective operational implementation.

6.3.1.2 Lessons from the Ghana Capitation scheme

The Capitation Grant strategy has been very successful and has narrowed economic, gender and geographical disparity figures regarding education in Ghana. The full abolition of school fees constitutes a relatively simple strategy that has had an immediate and considerable impact on access to education. In Ghana, the grants have created a great deal of momentum and generated additional support from international agencies. The Government's determination to adopt a holistic approach to the development of education within the framework of mobilizing all available resources - human, material and financial has yielded positive results. In Ghana presently, primary education is practically free and compulsory, though the mode of enforcing compulsory attendance is not clarified. The success of the FCUBE programme is evidenced by the fact that Ghana's illiteracy rate is one of the lowest in Africa today as a result of the FCUBE programme. At present, more than 80% of Ghana's children are enrolled and staying in primary school, a rate far ahead of most countries in sub-Saharan Africa.⁶⁹

Financial sustainability is a critical issue in the free primary education programme. The EFA process has emphasised that enrolment growth alone is not sufficient to meet development needs, and that concerns for quality and achievement must co-exist alongside enrolment targets. In Ghana, for example, the reassertion of fee-free education in 2005 through the school capitation grant scheme has created 'extra demand of about 13,400 classrooms' mostly needed in poor rural areas.⁷⁰ Thus, not only are more teachers needed, but also the new teachers should be effectively trained. This has placed new pressures on the financing of teacher education and its costs. Where the challenges that this has created are not met, the obligations under the human rights laws will be compromised by rising pupil-teacher ratios and increased numbers of untrained teachers. Thus, as fee-free education policies take root and more public schools become available. The Education Ministry receives biggest budget

⁶⁸ Little, note 10, p.33.

⁶⁹ Global Initiative on Out-of-School Children Ghana Country Study , note56 p.18.

⁷⁰ MOESS, (Accra: Ministry of Education Science and Sports 2007) p.81.

allocation to implement programmes.⁷¹ Parliament approved GH¢ 5,816,315,000.00 (\$1,515,890,823.35) for the Ministry of Education to implement its programmes and pay compensation in the 2014 fiscal year.⁷²

CGS is not devoid of challenges. Some of the challenges identified include overcrowded classrooms, and exacerbation of teachers' workloads. Overcrowding and insufficient teaching and learning materials will inevitably lead to a fall in the quality of teaching. The 'pull' between strong commitment of governments and donors and available resources was another issue. On balance, the capitation grant creates national momentum. The CGS is a pro-poor strategy and it is the poor, in particular, who have responded by enrolling their children in public schools. The scheme has also narrowed gender and geographical differences. Even the Northern Region (where rates were lowest) experienced a large increase in school enrolments. In Ghana, the capitation grant has generated additional international funding support. Without doubt, effective financial system for the transfer of funds from the central to the school level has been the key to successful implementation of the scheme.

6.3.2 Kenya: The Second Universal Free Primary Education Initiative (FPE)

Upon winning the December 2002 election, the National Rainbow Coalition (NARC) Government implemented one of its pre-election pledges to provide universal primary education. It declared that as of January 4, 2003, all Kenyan children were entitled to enroll in public primary schools.⁷³

6.3.2.1 Process of Planning and Implementation of the FPE in Kenya.

Kenya's implementation of the FPE programme was called the 'big bang' fee abolition programme, because the Kenyan government announced it would stop charging fees for primary school education — just days before the beginning of the 2003 school year, the result was pandemonium because a number of things had to be done very quickly, to allow the immediate implementation of the FPE. The free primary education reform in Kenya was introduced as a result of political euphoria arising from the 2002 general elections whose results brought the National Rainbow Coalition to power, under President Mwai Kibaki. To

⁷¹ www.gbcghana.com/1.638311 accessed 12/08/2014

⁷² *Ibid*

⁷³ Oketch, Moses & Anthony Somerset, *Free Primary Education and After in Kenya: Enrolment impact, quality effects, and the transition to secondary school* Create Pathways to Access, Research Monograph No. 37 University of Sussex, Sussex, May 2010, p.1

meet school expenses, the Government adopted a strategy for direct transfer of funds (excluding teachers' salaries) to individual school accounts.

Mode of disbursement of the grant

At the national level, in the implementation of free primary education, the Kenyan Ministry of Education established a system in which all 18,000 public primary schools can receive Capitation Grants. The annual amount of 1,020 Kenyan shillings (\$14) per pupil was for educational materials, as well as for the repairing of school facilities and ensuring quality assurance. The total grant amount for each school is determined by the number of pupils enrolled. The Capitation Grants had been based on student enrolment and 1,020 Kenyan shillings (\$14) were allocated per pupil per year.⁷⁴ Under the free primary education policy, each school was directed to keep two accounts to receive the capitation grants from the Ministry of Education.⁷⁵ These accounts were to be managed by the School Management Committee (SMC).

This committee was composed of a teacher from each standard, the head of the school, the deputy head teacher, the chairman of the SMC, and an elected parent representative. The government enhanced the school audit unit by employing additional auditors and, for the first time, required an annual audit of primary school account books. To ensure effective FPE implementation, the government institutionalized the monitoring of funds and other resource use and accounts were displayed for possible scrutiny by stakeholders.⁷⁶

Along with abolishing school fees, the Government strictly prohibited each school from collecting levies or any money from parents.⁷⁷ In terms of funding, expenditure on education as a percentage of the total government expenditure rose from 16.5 % in 2000/01 to 20.1 % in 2003/04.⁷⁸ Likewise as a percentage of the GDP, education expenditures rose from 6.1% in 2000/01 to 7.1 % in 2003/04.⁷⁹ This was one of the highest allocations for education in Africa. Education also absorbed between 35-40 % of the recurrent Government budget of which the primary education sub-sector received 51 % annually.

⁷⁴ Vos *et al*, note 45

⁷⁵ Sawamura, N., & Sifuna, D. Universalizing Primary Education in Kenya: Is It Beneficial and Sustainable? (2008) Vol.11 No.3 *CICE Hiroshima University, Journal of International Cooperation in Education*, pp.103 - 118 at 106.

⁷⁶ *Ibid*

⁷⁷ MoEST *Policy Framework for Education, Training, and Research*, Sessional Paper No.1 of 2005 (Nairobi: Ministry of Education, Science and Technology 2005).

⁷⁸ Ministry of Education, Science and Technology (MOEST). *Report of the task force on implementation of free primary education*. (Nairobi: Ministry of Education, Science and Technology 2004).

⁷⁹ *Ibid*

6.3.2.2 Coping Strategies and Mechanisms

To allay the fear that the FPE would lower the quality of education in public primary schools, the ministry intensified quality monitoring and standards assessment visits to all schools to ensure that disbursed funds were used prudently to meet the needs of curriculum implementation. According to Bold *et al*'s assessment, education spending in Kenya since the introduction of the FPE has certainly been impressive.⁸⁰

6.3.2.3 Achievements and the Challenges of the FPE in Kenya

It has been widely acclaimed that the FPE programme has had positive effects on children and parents in Kenya.⁸¹ The drive to achieve the educational MDG target is a positive indicator of the nation's commitment to its human rights obligations in respect of the right to education in conformity with the adopted conventions.⁸² In pursuant of that obligation, the current education curriculum in Kenya has been formulated to enhance national unity, social, economic and cultural aspirations of Kenyans.⁸³ The introduction of FPE has led to a tremendous increase in the enrolment of students in all schools across the country. The abolition of school fees and levies removed one of the major barriers to access to education for children of parents with limited resources and reversed a trend of declining enrolment rates. Other indicators of success include provision of quality education, improved completion rates, reduced repetition and dropout rates, improved textbook-pupil ratio, and enhanced supply of instructional materials.

After the introduction of the FPE in 2003, the primary school completion rate increased from 62.8% in 2002 to 68.2% in 2003 and rose further to 76.2% in 2004.⁸⁴ The primary school dropout rate also declined from 4.9 % in 1999 to 2.0 % in 2003. One of the key achievements of the FPE is the provision of learning materials, particularly textbooks in primary schools, which has greatly improved the quality of education. Children now receive textbooks, exercise books, pencils, and geometrical sets.⁸⁵

⁸⁰ Bold *et al*, note 47

⁸¹ Otieno Samuel, 'Kenya: A top achiever of universal education' *The East African Standard (Kenya)*, Saturday, 26 July 2003 available at; <file:///E:/Kenya%20A%20top%20achiever%20of%20universal%20education%20%20Norwegian%20Council%20for%20Africa.htm> accessed 12 April 2014.

⁸² Kenya Ministry of Education and Science, (MOEST)2008

⁸³ *Ibid*

⁸⁴ Vos *et al* , note 45

⁸⁵ *Ibid*

Government and donor support for the FPE reached more than US\$130 million between 2003 and 2005.⁸⁶ The principal external partners for the FPE were the World Bank, DFID, CIDA, and the Swedish International Development Cooperation Agency (SIDA). Despite these positive effects of the FPE, its implementation has proved quite difficult and it has been confronted with different challenges. First, insufficient planning led to crowded classrooms sharing few resources and inadequate facilities. Secondly, construction of additional schools and classrooms was not part of the initial FPE budget, and the enrolment surge placed a strain on the existing schools.⁸⁷ Thirdly, with the abrupt implementation of free primary education, most parents, stakeholders, teachers, students were confused of the goals and meaning of free primary education. There was confusion over the meaning of free primary education and in particular the role of the stakeholders. Some skeptics felt that the free primary education policy was a political move or gimmick - a political venture by the government to fulfil its election promise and comply with international conventions.⁸⁸ Fourthly, a lack of adequate training was highlighted in the FPE implementation. School managers had no or little prior knowledge, capacity, or skills to handle large sums of money at the school level. Indeed, most primary schools had not previously operated functional bank accounts, which was a necessity under the policy. There was no established accountability system at that level, and many feared resource mismanagement by SMCs. Finally there was the problem of under staffing, even before the declaration of the FPE, the country had faced a teacher shortage caused by a public sector employment freeze ordered by the Government in 1997.⁸⁹ Despite encountering some teething problems such as shortages of teaching staff and other necessary education inputs, the FPE has, nevertheless, significantly boosted Kenya's chance of realizing universal primary education as stipulated in the EFA and the MDG programmes.

6.3.2.4 Positive Impact of the FPE in Kenya

Political commitment and goodwill on the part of the government and the populace are critical to the successful implementation of an FPE program. The program has enjoyed goodwill from the highest offices of the government —the president, cabinet ministers,

⁸⁶ The World Bank & UNICEF, *Abolishing School fees in Africa: Lessons from Ethiopia, Ghana, Kenya, Malawi and Mozambique*, p.40.

⁸⁷ UNESCO *Challenges of Implementing Free Primary Education in Kenya*, Nairobi Office:UNESCO, March 2005) p.24.

⁸⁸ Otike, Wawire *Free Primary Education in Kenya and its challenges in fighting Illiteracy* available at www.iiste.org/Journals/index.php/JEP/ [accessed 6 August 2014].

⁸⁹ The World Bank & UNICEF, *Abolishing School Fees in Africa* note 86, .p.146.

assistant ministers, and members of parliament.⁹⁰ From report, there was consensus that the FPE programme was a major milestone in the country's education system as it opened the doors for children, who would have otherwise missed a chance to access education and improve their lives.⁹¹

Certainly the FPE programme has been very popular and it has motivated children to learn, offered teachers a chance to utilise their skills to the best of their abilities, and gave schools the opportunity to optimise resource utilisation.⁹² Pupils were provided with exercise and textbooks which gave them the opportunity to carry home reading materials and do their homework assignments, revise on their own and prepare ahead of their teachers, thus making learning an enjoyable experience. Moreover, pupils were no longer missing lessons due to lack of fees as used to happen in the past. This consistency in classroom attendance has been helpful in realising quality teaching and the drop-out rate has decreased. The FPE programme has been an opportunity for countless Kenyan children who would not otherwise have had access to education to be able to do so. Thus, on balance, the FPE program in Kenya has yielded more positive than negative results.

In this case study of Ghana and Kenya as analysed above, it emerges that grants were provided by the state as capitation grants for education, which helped significantly in funding the cost of free and compulsory education in both states. In each case, the level of the grant was fixed per pupil, and the total amount received per school was directly proportional to the number of pupils enrolled. The grants were aimed at providing schools with the non-salary recurrent expenditures for an essential package of non-salary education inputs to enhance the quality of education.⁹³ From the two case studies, it also emerges that apart from providing essential financing, use of school grants has many other positive impacts, such as promoting closer cooperation between, and empowerment of, schools and local communities, revitalizing school councils, and enhancing accountability of schools in the use of money and learning outcomes.⁹⁴ Furthermore, accounting in relation to the grant mechanism seeks to increase transparency and accountability of resources.

⁹⁰ *Ibid*

⁹¹ UNESCO *Challenges of Implementing Free Primary Education in Kenya*, (Nairobi Office:UNESCO,March 2005) p.273

⁹² *Ibid*

⁹³ Akyeampong,K. *et al*, *Access to Basic Education in Ghana:The Evidence and the Issues*, Country Analytic Report, CREATE Centre for International Education, University of Sussex, June 2007, p.13

⁹⁴ Assie-Lumumba, N'Dri, 'Editorial Africa-Asia University Dialogue for Basic Education Development', (2008) Vol 11 No3 *Journal of International Cooperation in Education* , pp5-17 at p.6.

6.4 Legal Framework for the Implementation of FPE in Ghana and Kenya

Pursuant to Article 2 of the ICESCR which requires State Parties to take necessary steps including particularly the *adoption of legislative measures* - with a view to achieving progressively the full realization of the rights recognized in the Covenant, national laws and policies are important because they concretely define the framework of rights and obligations for actors in the country. The Constitution is the highest legislative norm as it sets out general principles to which all other national laws and policies have to adhere. As previously emphasised it is strongly recommended that the right to education is enshrined in national constitutions. Consequently where an educational policy or law does not respect the Constitution, it can then be challenged before the courts.

As the Constitution is the highest law of the land and source of all governmental powers, the Constitution of a country sets out general principles to which all other national laws and policies have to adhere. As observed by the US Supreme Court in *Gonzales v. Reich*, ‘... The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. ...’.⁹⁵ Thus the examination of the protection of the right to education in the national laws of the two countries will first be examined in will first be examined in their respective Constitutions, then followed by other relevant laws.

6.4.1 The Right to Education in the Constitution of Ghana

The 1992 Constitution of Ghana is very strong in terms of human rights protection. Chapter V of the Constitution guarantees a number of fundamental rights and freedoms, which ‘shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them by all natural and legal persons in Ghana, and shall be enforceable by the courts as provided for in this Constitution’.⁹⁶ The right to education guaranteed by the Constitution includes Article 25 (1) which provides as follows:

All persons shall have the right to equal educational opportunities and facilities and with a view to achieving the full realisation of that right: (a) *Education shall be free, compulsory and available to all*. The term, ‘all persons’, certainly includes all children.⁹⁷

⁹⁵ *Gonzales v. Reich* 545 US 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 - Supreme Court, 2005.

⁹⁶ Article 12 1992 Constitution of Ghana

⁹⁷ Article 25 Constitution of Ghana

Notably, the provision determines the State's duty towards education to be effectuated through the guarantees of; free, compulsory basic education, including assurance that it will be offered costing nothing for all. Interestingly, with education's placement in the constitution as a fundamental right, the constitution allows for seeking redress in the courts if the right to education is violated. The Constitution also contains a provision specifically for children's rights in Article 28, with Article 28(1) placing an obligation on Parliament to enact laws which will ensure that parents do not abdicate their responsibility to care and maintain children they have brought into the world. Article 28(2)-(5) assure and guarantee important rights to children. Specifically, Article 28(2) provides that every child has the right to be protected from engaging in work that constitutes a threat to his health, education or development.

Another article addressing the right to education is Article 38 which specifically directs that:

The State shall provide educational facilities at all levels in all the regions of Ghana, and shall, to the greatest extent feasible, make those facilities available to all citizens... [The] Government shall draw up a programme for implementation within the following ten years, for the provision of free, compulsory and universal basic education.

This provision thus takes the state obligation to provide free and compulsory primary education further from the narrow concept of primary education to the national provision of basic education. It is submitted that the 1992 Constitution of Ghana committed Ghana to the principle of free universal basic education and gave this commitment some substance by establishing a time-frame. As a result, the 10-year FCUBE emerged from this constitutional mandate in 1996. From this emerged the "Capitation Grant Scheme", which removes the barriers of fees and levies that poor families face when considering schooling for their children. This has enhanced access to school for all children in Ghana. The FCUBE policy in Ghana, introduced in 1992 and formally launched in 1996, was apparently pursuant to this constitutional mandate and frames the current basic education policy in Ghana. In sum, the 1992 Constitution of Ghana sets a time frame within which the government will provide free, compulsory basic education, and at its expiration it fulfilled its commitment by establishing the FCUBE policy. Conversely, in the Constitution of Nigeria the government of Nigeria left the time when it will provide free compulsory universal primary education *sine die*.⁹⁸ It is submitted that Nigeria has an important lesson to learn from Ghana in that regard for

⁹⁸ S 18 (3) 1999 Constitution of Nigeria.

effective implementation of its international obligation on free and compulsory primary education in the country.

6.4.2 The Ghana Children's Rights Act of 1998

On ratification of the CRC, State parties are obliged to: '...undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present convention'.⁹⁹ Being a legally dualist State like Nigeria, the rights enumerated in the CRC can only be fully accessible to children in Ghana only through incorporation into the constitution or the municipal laws of the State. For dualist States a treaty that is not incorporated into the municipal law is as good as inconclusive.¹⁰⁰ Ghana having ratified the CRC¹⁰¹ thereby agrees to 'respect and ensure' the children's rights set forth therein.¹⁰² In order to conform its legislation, and administrative practice to the requirement contained in the CRC, Ghana enacted in 1988 the Ghana's Children's Act. The 1998 Children's Act (Act 560) reforms and consolidates the law relating to children by providing for the rights of the child, maintenance and adoption, and by regulating child labour, apprenticeship and related matters. The Act protects the right to education. Section 6(2) of the Act provides that: '[e]very child has the right to life, dignity, respect, leisure, liberty, health, education and shelter from his parents. The Act further specifies that, '[n]o child must be deprived of access to education, immunisation, adequate diet, clothing, shelter, medical attention or any other thing required for his development'.¹⁰³ The Children's Act of Ghana complements the constitutional provisions on the right to education.

There are other various, policy documents and reports, which have helped in meeting the educational needs and aspirations of the children in Ghana some of which are discussed below.

6.4.3 Key Policies towards Ensuring Free Compulsory Universal Basic Education in Ghana

Ghana has created a policy document on basic education improvement sector program put together by the government in 1996 to ensure implementation of the FCUBE. To facilitate the attainment of free education under the FCUBE programme, a number of programmes were

⁹⁹ Art 4 CRC

¹⁰⁰ Koh, Harold Hongju 'How is International Human Rights Law Enforced?' (Fall 1999) 74*Indiana Law Journal* 1397- 1413 at 1398.

¹⁰¹ Office of the High Commissioner of Human Rights, Status of ratification of the Convention on the Rights of the Child, available at <http://www.ohchr.org/english/law/crc-ratify.htm> (accessed on 12 July 2014).

¹⁰² Art 26 Vienna Convention

¹⁰³ Section 8 (1). *Children's Act Ghana 1988*.

implemented. First is the Quality Improvement In Primary Schools (QUIPS) programme, which is supported predominantly by USAID and helps to train competent teachers, train education managers and planners, and promotes a supportive learning environment.¹⁰⁴ The implementation of this programme has helped to expand access, improve quality teaching and learning, improve the supply of logistics and curricula development as well as motivate teachers.¹⁰⁵ Second is the Capitation Grant Scheme, already discussed earlier in this chapter. A Capitation Grant Scheme to help schools make up for missing fees which pupils would have paid was created in 2004.¹⁰⁶ The result is that this has led to considerable increase in school enrolment. Lastly is the School Feeding Programme, which was initiated in order to help ease the burden on parents in feeding their children. There has also been increasing international interest in supporting the school feeding programme.¹⁰⁷ The objectives of the School Feeding Programme are to enhance school enrolment, encourage attendance, ensure retention, and improve nutritional and health status of children. It uses home grown foodstuff to provide hot meal to primary school pupils. This is a pro-poor policy, based on the belief that one cannot teach a child with an empty stomach, rather, the child must be fed first, before he or she can assimilate. This has been known to have immediate gains in enrolment especially in poorer districts.¹⁰⁸ Indeed all the above programmes have enhanced enrolment and increased retention and completion of primary education.¹⁰⁹ Programmes like this are good example for other countries including Nigeria to follow.

6.4.4 The Right to Education in the Constitution of Kenya

Kenya's new constitution was promulgated on 27th August 2010 replaced the previous Constitution of 1963. The international treaties which Kenya has signed form 'part of the law of Kenya' according to Article 2(6) of the constitution. This means that as in monist states, explicit incorporation of international treaties is not required for the domestication of treaties. And by the impression of Article 2(5) of the constitution, the general rules of international law are considered to be part of Kenyan law and thus applicable in Kenya, but shall be

¹⁰⁴ The Mitchell Group (Stephen P. Heyneman, coordinator) Review of Basic Education Quality in Ghana Basic Education in Ghana: Progress and Problems, (USAID June 2009) p.4.

¹⁰⁵ *Ibid*

¹⁰⁶ Madeez Adamu-Issah, *et al*, *Achieving Universal Primary Education in Ghana by 2015: A Reality or a Dream?* (New York: UNICEF, 2007)

¹⁰⁷ The World Bank & UNICEF, note 86, p.121

¹⁰⁸ *Ibid*

¹⁰⁹ *Ibid*

subject to the Constitution.¹¹⁰ Kenya being a state party to both the CRC¹¹¹ and the ICESCR¹¹² primary education should be compulsory and available free to all. Conversely, in Nigeria, which is a dualist state, no treaty has the force of law unless it has been enacted into law by the National Assembly.¹¹³

The 2010 Constitution of Kenya departs from its predecessor by including a list of socio-economic rights formulated as direct entitlements. The economic, social and cultural rights are provided for under Article 43(1). Of key concern, Article 43(1) (f) provides for the right to education. In the concluding observations adopted by the ESCR Committee after examining Kenya's initial reports in 1993, the Committee had recommended that Kenya should incorporate the Covenant rights into its domestic law. The provisions of Article 43 are based on the concluding observations.¹¹⁴ In addition to the general right to education under Article 43, other key constitutional provisions relating to the right to education include, Article 53(1)(b)¹¹⁵, Article 54(1)(b)¹¹⁶ and Article 55(a).¹¹⁷ According to the constitution, education for children is an obligation that can be enforced through the courts. Article 21 reinforces the protection of the right to education, as it states in section 1 that:

[...] It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. [...] (4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.¹¹⁸

The Basic Education Act¹¹⁹ was enacted in 2013 to give effect to Article 53 of the Constitution. Section 4 of the Act stipulates the principles that inform the provision of basic education. It provides that; '...The provision of basic education shall be guided by the following values and principles- a) the right of every child to free and compulsory basic education... c) promotion of quality and relevance...'

¹¹⁰ Article 2(1) & (4) Constitution of Kenya.

¹¹¹ Date of accession of ICESCR by Kenya; 1st May 1992

¹¹² Date of ratification of CRC by Kenya; 30th July 1990

¹¹³ Section.12 (1) 1999 Constitution of Federal Republic of Nigeria.

¹¹⁴ Viljoen, F., *International Human Rights Law in Africa*, (2nd edition), (Oxford: Oxford University Press, 2012), p.550.

¹¹⁵ Article 53(1), 2010 Constitution of Kenya. '[e]very child has the right [...] (b) to free and compulsory basic education'.

¹¹⁶ The constitutional provision provides for access to education institutions and facilities for persons with disabilities and for the youth

¹¹⁷ Provides for the right of access to relevant education and training.

¹¹⁸ Article 21 (1) Constitution of Kenya 2010

¹¹⁹ No. 14 of 2013 it repealed Education Act Cap 206 Laws of Kenya.

In Part 1 of the Fourth Schedule of the Constitution the obligation of the National Government as regards education is clearly spelt out as follows: ‘The National government is responsible for legislating on the following matters as regard to education: matters on education policy, standards, curricula, examinations and the granting of university charters.’¹²⁰ The National Government is also responsible for matters relating to primary schools, universities, tertiary educational institutions and other institutions of research and higher learning schools, special education, secondary schools and special education institutions.¹²¹ The system of education administration, from this constitutional provision is mainly centralised. There has been some concern that centralised school management, funding and monitoring has undermined local accountability and ownership.¹²² It is a well-known fact that the driving force of educational decentralisation is the need for democratisation and the improvement of public service delivery, coupled with the trend in international funding agencies.¹²³ The World Bank’s argument is that the shift in decision making power, as well as the diminishing of distance between the service provider and the recipient, is considered by aid agencies and advocates improving service to the citizens, particularly when the central government is inefficient and corrupt.¹²⁴ Specifically in the education sector, central government devolves and delegates power to local governments. It is argued that under free primary education policy, the intention of the central government’s policy is to provide equal and universal opportunities for education for all. It is hereby submitted that there should be combined responsibilities between the central government and the various states in the country.

6.4.5 Kenya’s Children’s Act 2001

Kenya enacted the Children’s Act in 2001. The Act received presidential assent on 31 December 2001 and became effective on 1 April 2002. The enactment of the Children's Act of 2001 gives effect to the obligations of Kenya under the CRC and the ACRWC. Since enactment of the Children’s Act, Kenya has been working to implement its ideals in domestic legislation concerning childcare and protection, and also seeks to enhance the welfare of children in Kenya. The Children Act further provides for the right to education. Section 7 of the Act provides that ‘(1) [e]very child is entitled to free and compulsory primary education

¹²⁰ Item 15, Fourth Schedule Part 1 Constitution of Kenya 2010.

¹²¹ Item 16, Fourth Schedule Part 1 Constitution of Kenya 2010.

¹²² Bold *et al* note 47, p.7

¹²³ *Ibid*

¹²⁴ World Bank 2003.

the provision of which shall be the responsibility of the Government and the parents'. It is noteworthy that the Act specifically named the state and the parents as the duty bearer of this right, in line with RBA to education programming.

6.5 Examination of Compliance by the Two Countries to their Obligations to Protect the Right to Free Primary Education Based on the Report Submitted to the CRC Committee

This section analyses Ghana's and Kenya's CRC reports, by identifying the status of children's rights to education to highlight the achievements and gaps, challenges and constraints. The CRC stipulates that States are required to submit periodic reports to the Committee, describing the situation of children's rights in their country and the measures taken to meet their obligations and responsibilities outlined in the Convention.¹²⁵

6.5.1 Concluding Observations on Ghana's CRC Report

The Committee considered the second periodic report of Ghana in 2005.¹²⁶ In the Committee's concluding observation, a number of positive steps were noted. For example, the remarkable improvement made in the field of education in introducing the Capitation Grant, was extolled, and also the introduction of school feeding programme in three regions of northern Ghana was commended.¹²⁷ The Committee recommended the extension of the school feeding programme to other regions of the country and also recommended that the State party increase and efficiently use public expenditure in education. They also recommended improving access to vocational training and informal education for vulnerable groups, including street children, orphans, children with disabilities and child workers. Another recommendation was to increase enrolment in primary and secondary education and end gender disparities in the access and full enjoyment of the right to education. Finally, the Committee noted the gap between the positive laws regarding children's right taken by Ghana and the practice. Generally, the Committee's report gave some positive feedback of Ghana's educational initiatives.

¹²⁵ Article 44 CRC

¹²⁶ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Second Periodic Reports of States Parties Due in 1997, Ghana*, 14 July 2005, CRC/C/65/Add.34, available at: <http://www.refworld.org/docid/43f3054a0.html> [accessed 20 April 2015]

¹²⁷ *Ibid*

6.5.2 Concluding Observations on Kenya's CRC Report

It is necessary to start by highlighting Kenya's initial report to show the remarkable improvement in the implementation of the Convention especially ensuring the right to free primary education after the first report. The initial report submitted to the CRC Committee in 2001 described an education system that was hampered by several constraints.¹²⁸ Some of which were that the number of working children has been increasing due to rising levels of poverty in the country, the cost-sharing policy, which meant that Kenyan parents contribute to the recurrent school costs. This was a factor inhibiting children from having access to schooling. Further, children with disabilities were grossly under-enrolled in Kenyan schools.¹²⁹ Children's right to education was, during the period covered by the first report, severely affected by the government's low budgetary allocations to the sector.

Unlike the first report, the second CRC report submitted in 2007 highlighted a number of improvements towards implementing children's right to education.¹³⁰ A positive development is the introduction of free primary education in 2003, which led 1.3 million children to leave work and register in schools that year. The report considered FPE an important milestone towards the implementation of the CRC. In the second report the following were also commended; the co-operation between the government and development partners accelerated the strengthening of the educational sector. The Children Act which has provided children with enhanced legal rights has been enacted. In all, by the time of the second report, there have been considerable improvements for Kenyan children in their right to education, through the Free Primary Education initiative. Overall, Kenya has made a number of important achievements towards the realisation of children's rights as stipulated in the CRC. With comprehensive and progressive legislations and policies in place Kenya is on course to make the right to free and compulsory primary education a reality, so as to release the great potential of every child in Kenya.

¹²⁸ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: State Party Report: Kenya*, 16 February 2001, CRC/C/3/Add.62, [accessed 10 April 2015].

¹²⁹ *Ibid* para 360.

¹³⁰ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Kenya*, 19 June 2007, CRC/C/KEN/CO/2, available at: <http://www.refworld.org/docid/4682102b2.html> [accessed 20 April 2015].

6.6 Practical Lessons for Nigeria from these Two Countries

The case studies of these two countries demonstrate important legislative and policy lessons for the effective implementation of free and compulsory primary education for other African countries. The following lessons in particular deserve to be highlighted. First and most important, it is apparent that the two countries have a fundamental commitment in common; this is a constitutional guarantee of the protection of the general rights of children and specifically the children's right to education. By centralising education as a key focus in the constitutions of the two States, these countries establish important baseline requirements that set the frame for policy and judicial challenges to educational rights. It is important to highlight that the centralisation processes were not absolute. Though there was decentralization of empowerment of schools and communities, and promotion of greater local-level accountability which yielded great benefits as seen in the disbursement of the capitation grant for the FPE scheme.

Secondly, there was political leadership and willingness. In the two countries, political willingness by the leaders to ensure implementation of free primary education in their countries was apparent. For example, Kenya analysis shows the need for continuous reassurance by the government, and confidence building among stakeholders to prevent them from giving up under extreme pressure. It may also require consensus building with opposition politicians who may not have supported the new policy during the election campaign as was the case in Kenya. Ideally, in the preparation of free primary education programmes there should be comprehensive communication and consultation to explain the content, impact, and implementation process of the new policy to key stakeholders such as parents, teachers, local communities, political constituencies, and education administrators. Thirdly, both countries tried to identify ways of improving and maintaining quality in the implementation of the scheme. The Ghana study highlighted the imperative to safeguard the quality of education in a situation of rapid enrolment increase and the overarching challenge of the fee abolition policy. The Kenya study emphasised that the challenges to quality should be dealt with before declaring an abolition of fees and levies so that the quality of schools is not compromised. The issue of quality is very critical because with the introduction of FPE in any State, there is always the public concern about the deterioration in the quality of education. Lastly, the two countries made provisions for sustainability of the programme. They ensured that the programme was not hindered as a result of inadequate funding. Both countries increased their budgetary allocation for education and primary education received

the highest budgets.¹³¹ Education funding was given priority over all other sectors in the two countries.¹³² Seeing the seriousness exhibited by the two countries in the implementation of FPE, they enjoyed the goodwill, support as well as aid from international donors and the benefit of debt reduction from the World Bank.

6.7 Conclusion

The chapter has attempted to make a comparative analysis of the implementation of free primary education scheme in Ghana and Kenya. For these countries, the first attempts at the FPE could not be sustained due to a combination of worsening economic conditions, reduced education budgets, and re-emergence of school fees. The introduction of cost sharing at the primary level in particular had a detrimental impact on the enrolment rate and school attendance particularly of children from poor households. This exacerbated the number of out- of -school children. The two countries for this on-going free primary education programme have exhibited that the success of the implementation of free and compulsory primary education requires at least the following steps; first, commitment by the government to make and effectively implement appropriate policies. Second, careful planning, which involves prior analytical work to assess all that will be involved in both the human and financial resources. Third, invest the necessary resources to achieve the objectives and sustainability of the programme. Finally, mutual accountability and a responsibility mechanism between the government and the populace is also a key to the sustainability of the free and compulsory universal primary education programme. Comparatively, all these fundamental steps were missing in the case of Nigeria analysed in Chapters 4 and 5 of this thesis. There is therefore an imperative – need for Nigeria to employ these evidence-supported practices demonstrated in the cases of Ghana and Kenya as analysed in this chapter.

¹³¹ www.gbcbghana.com and www.cnbcfric.com for Kenya. Accessed 7 July 2013.

¹³² *Ibid*

Chapter Seven

Conclusion

7.1 Summary

This study has explored the development of free and compulsory primary education in Nigeria and analysed the barriers to its effective implementation over the years. This concluding chapter gives a summary of the study's findings, identifies the obstacles and makes necessary recommendations in that regard. The strength of the study is its in-depth analysis of the difficulties hindering the effective implementation of free and compulsory primary education in Nigeria. This was achieved by examining the country's legislations in comparison to its obligations under relevant international human rights instruments. The two key points underlying the study are: one, there are substantial barriers to access to free and compulsory primary education for children in Nigeria and, two, these obstacles can and must be surmounted. The lack of effective implementation of free and compulsory primary education is an issue of contention as a domestic matter for most developing nations, including Nigeria. As analysed in this study, Nigeria has not effectively implemented free and compulsory primary education as required by relevant international instruments to which it is a State party and it has essentially failed to undertake the required measures in order to fully eliminate the payment of fees in primary schools within its public educational system. In this study, it will be noted that Nigeria has made attempts at implementing the inherent right to free and compulsory primary education for all children albeit there are still several challenges being encountered by disadvantaged children. Challenges range from poverty, conflict, cultural beliefs to HIV/AIDS pandemic among others. Poverty is a reoccurring reason for non-completion of primary school. This is further justified by the evidence that costs of schooling are considered a reason for school dropout.

The study illustrates that an appreciation of the historical process is important to find solutions to the obligation of providing free and compulsory primary education for all children in Nigeria. Historically, the tradition and effort of providing free primary education in Nigeria predates the emergence of the human rights movement and the concept of the right to education under it. It is shown that the concept of education was always present in Nigeria, in form of traditional and Islamic education, but the form of delivery changed towards a more

formal type of education which was introduced by the missionaries and the colonial rulers in the twentieth century. The study reveals that a free primary education programme was implemented towards the end of British Colonial administration from 1955-1959 and continued after independence in 1960. The regional and the federal Government of Nigeria then emphasised its free primary education programme as a 'fee-free' only education. The abolition of fees gave opportunity for most children in the Federal Colony in Lagos and the various regions to have access to primary school education. A number of policies, laws, structural and programme processes were put in place then in order to achieve the free primary education initiative. The feats achieved in education delivery post-independence by the Nigerian communities and government was significant. While, in the context of colonial legacy, the issue of relevance of some of the curriculum content was questioned, there was no doubt that the qualitative performance of the schools was remarkable. The growing consensus of the importance of universal education in the building of a modern society was evident. There was also political willingness, as the government was determined to devote adequate funding and implement policy changes on education, in order to protect and advance the country. As a result, schooling became more accessible; however the increase in enrolment figures inundated the available resources. As a result this affected the quality of education. The military coup of 1966 exacerbated political instability and led to thirty years of military rule, which hindered the sustainability of the first free primary education programme. During the military era, the constitutions were repealed, suspended or replaced with decrees and every act of the government was implemented centrally including educational administration. The ruling military government then claimed that it was aiming at bridging the educational gap between the then Northern Nigeria and Southern Nigeria but the gap, unfortunately, still persists till today. It has been argued in this thesis that there must be intensive community involvement in delivering an effective primary educational system. The subsequent introduction of certain charges by schools and employment uncertainty during the period, led to the decline in the demand for fee-paying primary education. Between the 1980s and 1990s, due to economic recession and the decline in the income of families the cost of education became more unaffordable for most families. It is observed that there has been regression of the right to free universal primary education between the periods after independence to the period of political instability. These developments hindered the sustenance of the free primary education initiatives in Nigeria.

As free education is not only about tuition fees but involves more, an examination of its definition and scope was undertaken in chapter two in order to explore how the state has applied it. Essentially, school fee abolition is not just about abolition of “tuition fees” (which do not necessarily constitute the main bulk of fees), rather the pursuit of free primary education needs to take into consideration the wide range of the costs of schooling borne by families and households. This includes any direct and indirect costs/charges (tuition fees, costs of text books, uniforms, PTA contributions, costs related to sports and other school activities, costs related to transportation, contributions to teachers’ salaries, etc.), as well as opportunity costs and other burdens on poor families. This is not asking for the impossible, where there is necessary political will on the part of the government. For example, as highlighted in Chapter six, the Governments of Ghana and Kenya have taken bold steps forward, in that regard, by abolishing all fees charged by schools and also providing schools with a small grant for each pupil enrolled. Schools are therefore not permitted to charge any fees to parents except to provide school uniforms. This has resulted in increased opportunity of access to education for several children as discussed in chapter six. The introduction of Capitation grants by the Governments of Ghana and Kenya has been an important means of enhancing education access for all groups of school-age children. Currently, Nigeria has not got such a policy in place. It is argued in this thesis that having one of the highest numbers of out- of-school children in the world, and with its status as the largest economy in Africa, it is high time that Nigeria should adopt a similar programme, which will greatly boost primary school enrolment and ensure the effective implementation of a fully free and compulsory primary education system in the country. It is important to learn from experience and approaches of other countries as regards investment in education, and emulate good practices, based on a legal framework for financing education.

The study revealed that at first glance, Nigeria would appear to be complying with international standards based on the inclusion of the provision of free, compulsory primary education presently in its domestic laws such as the CRA and UBE Act. Both statutes do make guarantees and provide an affirmative obligation to a positive right to free and compulsory education. However, besides these positive legislative aspects, according to the international standards, Nigeria appears to be non-compliant in several important practical ways. A central challenge is the lack of a substantive provision guaranteeing the right to free and compulsory primary education in the Nigerian constitution, which is the ‘organic’ law of the land. Thus, Nigerians cannot effectively claim the right to education under the law when

this is not provided by the state as required under international human rights law. Indeed, the Nigerian Constitution does not expressly provide for a substantive right to education. Rather, the Constitution only provides the legal framework for educational objectives and educational management in the country.¹ In analysing the country's Constitution, it was noted that the constitutional provisions on education have limited the implementation of the right to education in three ways. Firstly, the Constitution states that, 'the government shall strive to provide free basic education whenever it is practicable',² without giving a definite timeframe. Twenty four years on the federal government and its component states have still not found the implementation of a fully free education practicable. Whereas Ghana in its 1992 Constitution provides that, '[t]he Government shall, within two years after parliament first meets after coming into force of this Constitution draw up a programme for implementation within the following ten years, for the provision of free, compulsory and universal basic education'.³ Whereas in Ghana following the 1996 reforms, a campaign known as "FCUBE" meant to advance the delivery of free compulsory universal basic education as guaranteed under the Constitution was initiated.⁴ The FCUBE programme owes its success to learning from many of the ideas from the recommendations of the previous educational policies of past governments. Following the FCUBE reform in 1996, which has had positive impression on donor agencies, a number of international donor agencies have contributed substantial funds for primary education projects in the country.

It is submitted that Nigeria should follow this good practice and set a realistic time-frame for meeting the basic free education provision in its Constitution. Although the ICESCR allows progressive realisation and acknowledges the possible constraints due to the limits of available resources, it still places the obligation on States parties to take necessary steps which must be 'deliberate, concrete and targeted' towards the full realisation of the right to education.⁵ The CESCR has clearly indicated that progressive realisation means that States parties have a specific and continuing obligation 'to move as expeditiously and effectively as possible' towards the full realisation of Article 13 of ICESCR.⁶ Courtis posits that although 'progressiveness' gives states some leeway in order to choose the means to achieve full

¹ S. 18, 1999 Constitution of Nigeria

² S.18(3)(a) 1999 Constitution of Nigeria

³ Article 38 (2) of the 1992 Constitution of the Fourth Republic of Ghana

⁴ UNICEF Global Initiative on Out-of-School Children: Ghana Country Study, April 2012, p.19

⁵ CESCR, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 para 43

⁶ *Ibid* para 44

realisation, but it does not imply absolute discretion or indifference regarding the outcomes.⁷ By not setting a time-frame for its realization of the right to education, it is submitted that Nigeria has thereby deferred, indefinitely, its responsibility for the implementation of its international obligation in that regard. It was further shown in the study that Nigeria has not effected the implementation of the National Plan of Action which ‘puts children first as a state policy’ and which emphasises health, education, and protection of children.⁸ This is a mandatory and continuous requirement and not subject to progressive realisation.⁹ This clearly indicates a gap between the Constitutional provision and Nigeria’s obligation under the ICESCR

Secondly, in the Constitution, the educational objectives of the Nigerian government are grouped under Fundamental Objectives and Principles of State Policy,¹⁰ and thus not capable of judicial enforcement.¹¹ As part of the domestic law of state parties, the right to a cause of action under the provisions of the CRC should be real and remedies should be genuine.¹² Sadly, this is currently not the case in Nigeria in respect of children’s right to education. However, recent developments in international and regional human rights law, domestic judicial decisions, and the work of many scholars¹³ demonstrate that socioeconomic rights including the right to education are not as different from other rights as is often supposed and that they can also be judicially enforced.¹⁴ The role of adjudication is to ensure that the right to education is respected, protected and fulfilled by state parties. Non-justiciability could drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.¹⁵ It is emphasised in the thesis that a rigid classification of

⁷ Courtis, Christian ‘Standards to Make ESC Rights Justiciable: A Summary Exploration in; The Justiciability of Economic, Social and Cultural Rights’, 2009, volume 2, issue 4 *Erasmus Law Review*, p.379.

⁸ Concluding observations: Nigeria, CRC/C/NGA/CO/3-4 21 June 2010, para 12.

⁹ para 13

¹⁰ S.18 1999 Constitution

¹¹ S.6(6)(c) 1999 Constitution

¹² Committee on the Rights of the Child, General Comment No. 3: General Measures of Implementation of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003) [hereinafter Committee on Children’s Convention].

¹³ Arambulo, Kitty, ‘*Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights. Theoretical and Procedural Aspects*’ (Antwerp: Intersentia, 1999). see also, Merali, Isfahan, and Valeri Oosterveld (eds). *Giving Meaning to Economic, Social and Cultural Rights*, (Philadelphia: University of Pennsylvania Press, 2001).

¹⁴ *Khosa and Others v Minister of Social Development and Others* Constitutional Court of South Africa, CCT12/03; *Mahlaule and Another v Minister of Social Development and Others*, CCT13/03. See also, *Graham v. Richardson* 403 U.S. 365 (1971).

¹⁵ CESCR *General Comment 9. The Domestic Application of the Covenant*, E/C.12/1998/24, para 10

economic and social rights as non-justiciable rights would be incompatible with the principle that human rights are interdependent and indivisible.¹⁶

Furthermore, administrative tribunals and the courts should recognise the justiciability of ESC rights and grant appropriate remedies in the event of violations of these rights by State or non-State actors. This study has tried to show that it is not impossible to develop standards for adjudication of ESC rights including the right to education; this has been done by courts and judges who, through innovative conceptual approaches, consider different aspects of ESC rights as justiciable.¹⁷ It is noteworthy, though, that the arguments made here should not be interpreted as a call to limit the mechanisms for monitoring the compliance with ESC rights only to litigation. It is simply suggested to *include* litigation as a mechanism in conjunction with other mechanisms, such as political mobilisation, monitoring by specialised or independent agencies or national human rights institutions, or the review of state reports. Despite that education as a right is incorporated into Nigerian domestic law through the Nigerian CRA and the UBE Act, this has not made the expected impact because of the constitutional constraint,¹⁸ as analysed above. This non-implementation of this right by the State cannot be effectively challenged due to the doctrinal barriers rooted in the constitution's provisions. Thus, although both the CRA and the UBE Act provide for the right to free primary education on paper, the reality falls far short, as implementation trails very far behind.

Thirdly, as described in chapter five and as provided in the Constitution, Nigerian primary education is delegated to the states and local governments¹⁹. While decentralization of primary education is laudable, this has unfortunately made the administration of primary education to be non-uniform across the country, due to mismanagement. While some states, such as Rivers State, Lagos State and Oyo State deliver free primary education programme, most of the other states in the country do not do so. Most of these other states do not have much means of revenue generating income coming in, so they rely mostly on their federal government budget allocation. To implement the free education programme without much fund is difficult for such states. The local governments have typically experienced only

¹⁶ *Ibid*

¹⁷ *Minister of Health and Others v Treatment Action Campaign and Others (TAC Case)* (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002) see also; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC). *Grootboom* 2001 (1) SA 46 (CC).

¹⁸ SS.6 (6) & 18(3) 1999 Constitution of Nigeria.

¹⁹ Fourth Schedule, Item 2(a) 1999 Constitution of Nigeria provides as follows: The function of a local government council shall include...(a) the provision and maintenance of primary, adult and vocational education

marginal success in the delivery of primary education throughout the country. The study reveals that this decentralized structure is under-resourced by the federal government to operate primary schools effectively and efficiently. It is noticed that the central government does not release sufficient resources for adequate provision of educational services.²⁰ While the decentralisation was supposed to foster local participation and ownership, insufficient resourcing, lack of accountability and low level fiscal autonomy has undermined efforts.²¹ The CRC Committee, in its 2010 concluding observation to Nigeria's report, recommended that primary education should be placed in the concurrent legislative list in the Constitution so that it will be administered and managed both by the federal government and the states.²² It is revealed in chapter five that salaries of teachers gulp 80 to 90% of educational budgets leaving only 20% of the budget for educational maintenance and operations. If the federal government takes responsibility of paying teachers' salaries and not consider it as part of the state's allocation for education, then the allocation to states for education will be used to cover operating costs. That is the approach adopted in Kenya, which has proved very successful. If there is enough resources for non-salaried costs then there will not be indirect demands on pupils to bear any charge for school maintenance. In line with the CRC Committee recommendations, it is hereby submitted that education should be included in the concurrent legislative list in the Nigerian Constitution and for states to be more supported with resources from the federal government, for more efficient educational services. With the present on-going debates for constitutional amendments in the country, the impetus towards a new socio-economic rights order is very much possible, with the right political will on the part of the Nigerian government. Also, cultural and religious doctrines add to the hindrance of educational development in certain areas of the country.²³

The thesis has critically analysed the administration of education by the Federal and states' ministries of education and identified the weaknesses in the present educational delivery system as led the FME. Some of the weaknesses that have been identified include insufficient institutional ownership of programmes and lack of leadership in co-ordination of programmes. For example the FME lacks in-put in respect of donor programmes and the

²⁰ UNESCO 2003 Report

²¹ Johnson, C. 'Local democracy, democratic decentralisation and rural development: Theories, challenges and options for policy' (2001) 19 *Development Policy Review*: 521–32.

²² Concluding observations: Nigeria, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, CRC/C/NGA/CO/3-4, 21 June 2010, para 71(e)

²³ The most affected are the girls who are denied education because of cultural beliefs that female children are inferior to male children. And with early marriage the girl-child will soon be married off, so she does not need education. The current wave of Boko Haram sect activity especially in the North Eastern part of the country education is stalled.

result of this is that donors rather than the FME dictate the pace of work and priorities. It is also identified that there are overlapping functions and responsibilities between the FME and some other educational bodies and commissions. For example, the UBEC is given responsibility for quality assurance, a role that overlaps with the previously established work of the Federal Inspectorate Service, which is a unit in the FME. The challenges in financing the implementation of free primary education as well as issues in maintaining the quality of education has also been critically examined.

From the analyses, the thesis yields three key findings. First, inadequate funding by the government was identified as a major obstacle to implementing free and compulsory primary education in Nigeria. A 2002 research by Hinchliffe,²⁴ showed that in 1962, total expenditures on education were equal to 15.2 percent of total government expenditure.²⁵ Of this, 50 percent of total public expenditures on education were allocated to primary education.²⁶ In the 1960s and 1970s, educational funding was on an upward trend, but since the 1980s the allocation has been in decline. Educational allocation as a percentage of total budgets ranged from 9.88% in 1986 to 3% in 1999.²⁷ The reasons for this downward trend can be partially attributed to the economic conditions, debt service burdens and competing claims from other social sectors,²⁸ but mostly to poor budgetary prioritization on the part of successive Nigerian governments. As it stands, Nigeria's educational allocation continues to fall short of international benchmarks. While Ghana, South Africa, Cote d'Ivoire, Kenya and Morocco allocated 31%, 25.8%, 30%, 23% and 17.7% respectively of their annual budget to education in 2005, ²⁹ Nigeria allocated 8.43 percent of its budget to education during the same period.³⁰ Nigeria's total annual percentage of budgetary allocations to education has been significantly lower than those of 20 World Bank sampled countries in 2012.³¹ The Dakar Framework recommended that at least 20% of the national budget or 5% of the Gross

²⁴ Hinchliffe, Keith., Public expenditure on education in Nigeria: issues, estimates and some implications Abuja', *Africa Region Human Development Working Paper Series*, Human Development Sector Africa Region The World Bank August 2002

²⁵ *Ibid* at p 5

²⁶ *Ibid*

²⁷ Amangionyeodiwe, L.A., Osinubi, T.S. 'The Nigerian Educational Systems and Returns to Education', (2006), Vol.3:1 *International Journal of Applied Econometrics and Quantitative Studies* p 31

²⁸ Olaniyi, O.O. & Adam, J.A., Public Expenditure and Human Development in Nigeria, in: *Human Resources Development in Africa*, Proceedings of the Nigerian Economic Society Annual Conference, pp157-198 at 161.

²⁹ Editorial, in; 'Africa- Asia University Dialogue for Basic Education Development', (2008) Vol 11, No 3 December *Journal of International Cooperation in Education*, p5.

³⁰ Kpolovie, P. & Obilor, I., Adequacy-Inadequacy: Education funding in Nigeria, (2013) vol 2(8) *Universal Journal of Education and General Studies*, pp.239-254 Aug Available on line <http://www.universalresearchjournals.org/ujegs/> accessed on 14August 2014.

³¹ World Bank (2012). World Bank selected 20 countries' annual budgetary allocation to education. Washington D.C.: The World Bank. <http://www.africaeconomicanalysis.org/gen/education10204234737htm>.

Domestic Product (GDP) should be spent on education³² while UNESCO recommends 26% both of which are significantly higher than the 8.43% allocated by Nigeria in 2005.

In 1986 the debt servicing and structural adjustment programme of the World bank/IMF had recommended the introduction of user fees in the primary education system of Nigeria and consequently many parents could not afford to send their children to school from this period. The introduction of school fees at the primary level created a barrier to school attendance for children from poor backgrounds, and resulted in a significant reduction in primary school enrolment since 1986.

Under the ICESCR, each State Party has an obligation to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources,³³ and to make plans and adopt necessary laws to ensure this.³⁴ The State must then allocate the maximum possible resources for carrying out the plans progressively.³⁵ Even when a State's resources are limited, it has an obligation to prioritize economic, social and cultural rights such as the right to education.³⁶ Therefore, it is submitted that Nigeria needs to adjust and prioritize its budgetary expenditure in a way that will have the maximum impact on the enjoyment of the right to education as required under its international obligation in that regard.

The study also reveals that a large percentage of the states' ministry of education budget is voted for recurrent expenditure to the detriment of capital expenditure for infrastructure in the educational sector. Certainly, there is need for an overall shift from the government's current spending of over 80% of its resources on recurrent expenditure, which has had adverse effects on infrastructural funding for education over the years.³⁷ The World Declaration on Education for All and the follow-up Dakar Framework for Action, both recognised quality of education as a crucial component in the global movement to achieve Education for All objectives. The Dakar Framework explicitly affirms that quality is at the heart of education.³⁸ The 1960 UNESCO Convention against Discrimination in Education, which was the first

³²The Dakar Framework for Action, Education for All: Meeting our Collective Commitments, 26-28 April 2000. www.unesco.org

³³ Article 2 (1) ICESCR

³⁴ CESCR *General Comment No. 3: The Nature of States Parties' Obligations*, 14 December 1990, E/1991/23, para 3, available at: <http://www.refworld.org/docid/4538838e10.html/> [accessed 14 August 2014]

³⁵ CESCR *General Comment No3*, para 10, see also Art 2(1) ICESCR

³⁶ *Ibid*

³⁷ Akinyemi, S., Olorunfemi, O., & Bassey, O., 'Funding Universal Basic Education in a Depressed Economy: The Case of Nigeria', (2010), Volume 7 Issue: 2, *Pakistan Journal of Social Sciences*, pp 85-89 at 85.

³⁸ Dakar Framework for Action: Education for all: Meeting our collective commitments (Paris, 23 May 2000), para. 40.

legally binding international instrument in the field of education, also makes explicit reference to the obligation to ensure quality in education.³⁹ The ESCR Committee has equally recognised quality as a key component of the right to education.⁴⁰ Thus, States have an obligation to lay down a uniform framework of quality standards applicable throughout the country. In Nigeria, budgetary provision for the improvement of quality in education is low, as the quasi-totality of the education budget is dedicated mainly to salaries. Quality is particularly undermined as evidenced by the fact that investment in development of pedagogic materials and school facilities remains under-funded.

The thesis has identified that despite the introduction of free primary education in 1999 which resulted in primary school enrolment explosion over the years, the budgetary allocation for education has not increased. According to Moja, the Federal Ministry of Education whose duty under the constitution it is to administer education,⁴¹ has not reacted effectively to the deteriorating conditions under which many schools are operating. Their main concern has appeared to be the increased enrolment figures.⁴² As articulated by Moja, poor quality school infrastructure as well as an insufficient number of schools is central problems in education in the country.⁴³ He concluded that the allocations for infrastructure in the government's budgets are inadequate, and that expenditures of these limited funds are also hampered by both inefficiency and corruption.⁴⁴ In some cases, only half the amount budgeted seems to be released.⁴⁵ In sum, it is apparent that Nigeria is not giving education sufficient priority in the national budget and the minimum resources for education are not effectively and efficiently utilized. As a direct consequence of these failures, user charges continue to apply and this is a major deterrent to children from poor background attending school.

The second key finding regards funding by international donors supporting the education sector. It is apparent that donor financing continues to play an important role in the education systems of Nigeria and is crucial for the programme's effective implementation. This is

³⁹ Art. 1, para. 2 UNESCO Convention against Discrimination in Education (1960). '[...]includes access to education, the standard and quality of education, and the conditions under which it is given'

⁴⁰ CESCR, *General Comment No 11 (1999) Plan of action for primary education (art. 14)* E/C.12/1999/4. 10 May 1999, para. 6.

⁴¹ Teboho, Moja, *Nigeria Education Sector Analysis: An Analytical Synthesis of Performance and Main Issues* (Abuja: World Bank Publication, 2000) p.12.

⁴² Oseni, M., 'Adequacy of budgetary allocation to educational institutions in Nigeria'. (2012) 3(1) *Pakistan. Journal of Bussiness and Economic Review* pp 143-157 at 144.

⁴³ Teboho, note 41.

⁴⁴ *Ibid*

⁴⁵ Akinyemi, S., Olorunfemi, O., & Bassey, O., 'Funding Universal Basic Education in a Depressed Economy: The Case of Nigeria', note 37.

discussed in chapters two and five of the thesis. There is heavy reliance on support for educational development from ‘development partners’, particularly the World Bank, DFID, USAID, JICA, UNESCO, and UNICEF. This is in line with Article 2 of ICESCR which obligates State parties, ‘[...] to take steps, individually *and through international assistance and co-operation*, especially economic and technical, [...] to achieving progressively the full realization of the rights recognized in the present Covenant’.⁴⁶ This is further reiterated by CESCR in its General Comment No 11: Plans of Action for primary education, in which the Committee calls upon the relevant international agencies to assist States parties to the greatest extent possible to meet their obligations on an urgent basis. Corruption in the education sector not only distorts access to education but also affects the quality of education. Despite public outrage, corruption persists in Nigeria because public officials have no fear of being held accountable for their actions.⁴⁷ The issue was highlighted in 2006, when it was discovered that US\$21 million had been lost in 2005 and 2006 to the illegal and unauthorised utilization of funds. As a direct consequence, over five million Nigerian children lacked access to primary education.⁴⁸ As a result of unchecked magnitude of corruption in the country, international donors exercise caution in giving aids towards educational development to the country directly. Insecurity in the country as a result of suicide bombings was also identified as limiting donor activities. The bombing at the UN headquarters in Abuja in August 2011 affected UNICEF’s ability to complete the Girls’ Education Programme (GEP2), due to the effect on its management systems as all records were destroyed.⁴⁹

The thesis also examined the legal framework of free and compulsory primary education in two African countries, Ghana and Kenya, analysing the effective financing and management of their primary educational programmes and the support of the international assistance in enhancing the sustainability of the programme. The findings on the good practices of these countries are expected to be helpful for Nigeria in its attempt to achieve free and compulsory primary education for its children.

The two countries’ analysis, which has been extensively discussed in chapter six, clearly indicates that the constitution of each of the two countries substantively guarantees the right

⁴⁶ Emphasis added.

⁴⁷ Hope, K.R. Sr., *From Crisis to Renewal: Development Policy and Management in Africa*, (Leiden: Brill 2002), p.104.

⁴⁸ Mumuni, Adetokunbo, & Sweeney, Gareth., ‘Public interest litigation for the right to education: the *SERAP v. Nigeria* case’, *Global Corruption Report: Education, Transparency International*, (Oxford: Routledge, 2013) p. 307.

⁴⁹ DFID Report on Nigeria 2013.

to education of all children. Ghana's 1992 Constitution provides for education to be 'free, compulsory and available to all'.⁵⁰ Article 38 (2) of the 1992 Constitution entitled every child of school-going age in Ghana to a balanced and broadly based curriculum which promised to promote the spiritual, moral, cultural, mental and physical development of pupils at the school and of society. It also aimed to prepare pupils for the opportunities, responsibilities and experiences of adult life. This provision is explicitly in line with the provisions of Articles 28 & 29 of the CRC. Also noteworthy, among the key provisions entrenched in the Kenyan Constitution is a comprehensive Bill of Rights which encompasses civil, political, economic, social and cultural and group rights. Of key relevance is article 53 1(b) which provided for free and compulsory basic education as a human right to every Kenyan child.⁵¹ Also article 43(1) (f) of the Constitution, provides for the right to education. The significance of having the right to education in the bill of rights empowers a child to go to court through his or her legal representative to enforce implementation when there is a breach. It is clearly evident from the analysis that there was a commitment to realising every child's right to free primary education from both countries. Both countries have adopted capitation grant schemes to ensure the effective implementation of the right to education as guaranteed under their respective constitutions. The introduction of the capitation grant schemes abolished all direct and indirect levies charged by primary schools by providing schools with a small grant for each pupil enrolled. In the case of Ghana, the analysis shows that since 2005, the abolition of school fees and the provision of assistance to schools through the capitation grant have had a great impact on boosting school enrolment and narrowing the gender gap in schools. In Kenya, each school was directed to keep two accounts to receive the capitation grants from the Ministry of Education. Today, more than 80% of Ghana's children are enrolled and staying in primary school, a rate far ahead of most other countries in sub-Saharan Africa.⁵² Both countries were not able to fund the free primary education programme by themselves but they receive substantial international aids in support of the effective implementation of their free and compulsory educational programmes.

While some educational practices in Kenya and Ghana were found to be centralised more than Nigeria's current practice, the local community involvement was significant. The governments in both countries involved the community by creating indices of community fund-raising and monitoring. These include involvement of the community in building and

⁵⁰ Article 39(2) 1992 Constitution of Ghana

⁵¹ Article 53 (1)(b) 2010 Constitution of Kenya

⁵² UNICEF, Global Initiative on Out-of-School Children, Ghana Country Study, April 2012, p.18

maintaining school facilities, and providing text books and stationery. At the local community level, school management committees, consisting of parents and community members have official governing authority for each school. The government policy of community participation in education service delivery has given communities opportunities for ownership over their schools and to oversee their efficient operation and performance. Nigeria has a lot to learn from these two countries.

Various international instruments have been adopted globally incorporating free primary education ideals. The two main international instruments focused on in this thesis are the CRC and the ICESCR and Nigeria has ratified both international instruments. As shown in chapters three and five of the thesis, there is, however, a significant gap between the country's international obligations under these international human rights treaties and its effective compliance at the state level. The 4A scheme evinced that there are differences between providing education and complying with the right to education.⁵³ It is evidenced by the analyses in this thesis that Nigeria is not currently fulfilling its international obligations on the guarantee of a good quality education. The state gives the excuse that it cannot be held accountable for fulfilling a duty if the resource needed to realise the right is not available. Tomasevski has emphasised that the wealth or the poverty of any country does not prevent its government from being held to account for human rights violations. It has been submitted in this thesis that Nigeria has failed to create a safe and healthy educational environment which is conducive to learning, and that it has not effectively developed a national educational plan in compliance with international human rights standards, or executed one efficiently.⁵⁴

7.2 Recommendations

Based on the summary of findings discussed above, the main recommendations of this thesis are grouped into four categories. The first and foremost recommendation would be to emphasise the need for a Constitutional amendment. The second recommendation is on the need to make free and compulsory primary education available to the disadvantaged group of children. The third is about the necessity of increasing the state's financing of primary education. The fourth recommendation then moves to the overhauling of the management and

⁵³ The 4A scheme provide for the four key elements of interpreting the right to education. They are namely: availability, accessibility, acceptability and adaptability. They were developed by Katarina Tomaševski, the former UN Special Rapporteur on the Right to Education, and the UN Committee on Economic, Social and Cultural Rights (CESCR)

⁵⁴ Concluding Observations: Nigeria, CRC/C/NGA/CO/3-4

administration of education and, finally, the urge for the state to commit more strongly towards the delivery of free and compulsory primary education.

7.2.1 The Need for Constitutional Amendment

In the Nigerian Constitution, there is no explicitly enumerated or substantive right to education despite its ratification of the CRC and ICESCR.⁵⁵ It is recommended, based on the findings of this study that government should make education a fundamental right substantively entrenched in the country's constitution. Though the national legislations, namely the CRA and the UBE Act, guarantee the right to education, it is argued that these laws do not provide as strong protection as the Constitution due to the doctrinal barriers rooted in the constitution's provisions.⁵⁶ A state in the country can adopt or refuse to adopt any law enacted at the national level on children, due to issues on children being within the residual list in the constitution.⁵⁷ This potentially creates non-uniformity in the laws protecting children and their rights. By continuing this type of legislative structure, the State is not working to achieving access to free and compulsory primary education for all children. A constitutional amendment incorporating a substantial right to free and compulsory basic education would empower the populace to judicially enforce that right and also enable the Nigerian Courts to uphold the right of the child to free education. Children, as right bearers, should be able to sue under the terms of the constitution if their right to education is being deprived. It is submitted that, in light of the fact that similar provisions have already been incorporated in the constitutions of other African states such as Ghana and Kenya, Nigeria has no excusable moral or legal justification for not doing so.

7.2.2 Make Education to be Accessible to all Children, especially the most Vulnerable Groups, without Discrimination

Nigeria must ensure equal access to primary education to all children of school age residing in its territory, including non-nationals, and irrespective of their legal status.⁵⁸ The importance of educating the poor, the excluded children in urban slums and the rural poor and the girl- child must receive special consideration, with indisputable commitment to ensuring their access to free primary education. For example, the Constitution of Brazil provides that education shall, inter alia, be provided on the basis of the principle of 'equal conditions for

⁵⁵ Dakar Framework for Action, Executive Summary

⁵⁶ S.6(6) 1990 Constitution of Nigeria

⁵⁷ S.4(7) 1990 Constitution of Nigeria

⁵⁸ CESCR *General Comment 13, The Right to Education*, E/C.12/1999/10 para.34

access to and remaining in school'.⁵⁹ Transforming the right to education from an idea into a living reality requires national level action in line with international normative framework. In its 'Concluding Observations' on consideration of report submitted to Committee on the Rights of the Child,⁶⁰ made recommendations and suggestions to the state party that Nigeria must consider affirmative action programme to ensure girls, children with disabilities and street children's effective access to education.⁶¹ In addressing issues concerning access to education of the girl child, government should have visible policy of mainstreaming a gender perspective into all policies and programmes so that before decisions are taken, an analysis is made of the effects on girls and boys, respectively. Retention of girls must be encouraged by allocating appropriate budgetary resources and by enlisting the support of the community and parents through campaigns and incentives including scholarships, for out-of-school girls. Measures to be taken by the government for universalizing access to primary education should include abolishing all fees and levies for primary education; providing text books and learning material to the poor and needy; and making available to the children from poor families bursaries and uniforms and school feeding programme. For children with disabilities facilities in schools should include ramps, spacious wash rooms that can accommodate wheel chairs; and adequate learning materials and equipment for the different forms of disability for such children. Some recommendation also should be made about the attitude and approaches of parent towards education of their children. The state has an obligation to protect the child from a third party that wants to prevent the child from receiving education. So compulsory education should be emphasised and legal sanctions against erring parents should be enforced. There is also the need for the government to States are in addition are required to adopt measures that would eliminate barriers to the implementation and ensure that national laws and policies that protect children are effectively implemented and enforced.

7.2.3 Increase in Funding of Primary Education

Presently, data on total government spending on education is sporadic, and data on government spending on primary education is difficult to find. There is no credible estimate of the total amount of public expenditure which is spent by the Federal, state and local governments on education and, subsequently, the sources, levels, trends and distributions across the various educational levels are not available for analysis. The missing information includes figures for real expenditures, public expenditures, absolute or relative to national

⁵⁹ Article 206 Constitution of Brazil

⁶⁰ Concluding Observations: Nigeria CRC/C/NGA/CO/3-4 11 June 2010

⁶¹ *Ibid* para 29

income, and the distribution of expenditures across the various educational levels either nationwide or in individual states. At the same time, the level of monitoring of state government expenditure is inadequate and there is no single location at which the annual budget books or audits is held, let alone collated and analysed.

It is recommended that the funding allocation for primary education needs to be increased because ensuring free primary education for all children in Nigeria is the foremost challenge to the country. The Government should increase the budgetary allocation to education because of its importance to the national economy, and implement safeguards, which with proper monitoring, would contribute more significantly to the empowerment of the public. The allocation of educational resources should be based on systematically worked out strategic priorities. The State should also devise necessary policies aimed at resource mobilization through local bodies that are responsible for basic education. Given the current economic and fiscal situation, there is a need to strengthen the linkages between costing policies and programmes, planning and resourcing, budgeting, implementation and monitoring. This will increase efficiency and effectiveness in the use of the resources available to education. In addition it is suggested that it should be included in the constitution of Nigeria, constitutional provisions for financing education, for example, the Constitution of Brazil⁶² contains elaborate provisions in this regard which is commendable. The Brazil Constitution provides for sharing of resources and responsibility at all levels in the Brazil's federal system. 18 percent of the tax revenue at the federal level and 25 percent at state and municipal level are required to be allocated to education, with priority to basic education (elementary and secondary education). These constitutional provisions also cover scholarships to be provided to needy students.⁶³ Similarly, Recommendation Concerning the Status of Teachers,⁶⁴ provides that;

...as the achievement of the aims and objectives of education largely depends on the financial means made available to it, high priority should be given, in all countries, to setting aside, within the national budgets, an adequate proportion of the national income for the development of education.⁶⁵

⁶² 2010 Constitution of the Federative Republic of Brazil

⁶³ *Ibid*, Article 212

⁶⁴ Recommendation concerning the Status of Teachers, 1966 available at; http://www.unesco.org/education/pdf/TEACHE_E.PDF accessed on 13 September 2014.

⁶⁵ *Ibid*, Article 10 (1).

Realistically, the costs of provision of free primary education, is a serious issue and one that needs to be addressed sufficiently consistently at the same time, it should be pointed out that for providing primary education free of charge, requirement of compliance with state obligations must be stressed. Throwing light on the state obligations undertaken for the right to compulsory primary education free of charge for all under the provisions of article 14 of the International Covenant, CESCR has stated that the nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child. The obligations undertaken under the provisions of article 14 of the International Covenant are similar with the political commitment made under the Dakar Framework for Action. In order for a State party to the International Covenant to be able to attribute its failure to meet its core obligations under article 13 (2) (a) to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, these core obligations. Nigeria is duty-bound to ensure that every child receives primary education, free of charge, which should be an inalienable fundamental right.

7.2.4 Better Management and Administration of Education

Statutorily, the Federal Ministry of Education (FME) is responsible for the regulation and management of education in the country. To discharge this mandate, the ministry is structured into eight departments and three statutory units. The state ministries of education have a similar structure with minor variations determined by peculiarities of each state. Although the FME has overall responsibility for policies and monitoring quality in the education sector, the ministry is advised by the National Council on Education (NCE). The NCE is the highest policy formulation body on educational matters, and composed of the Federal Minister of Education and the State Commissioners for Education. There is the need to streamline the FME itself is structured in relation to its parastatals, and the FME's relationship with them. This is necessary to reduce conflicts and dissipation of energy. The FME presides over the largest number of agencies in any ministry. This has resulted in a large number of institutions at different levels with often conflicting and duplicating mandates and no synergy between them. There is currently undue multiplicity of education support agencies.

The study shows in chapter five, that there are significant discrepancies between official data from the education ministry and data from information systems. This has resulted in the

availability of unreliable data in recent years. Linked to the institutional confusion is poor capacity to gather accurate data.⁶⁶ Without data, it is difficult to recommend an improvement plan for education. The lack of accurate, disaggregated data limits the possibility of monitoring the effectiveness of the state-led interventions.

A recommendation on the administrative side is the need for better records management. Although the federal government, states and local governments produce data on executed budgets annually, they are not collated into comprehensive Government accounts or made available to the public. Without reliable data, it will not be possible to understand the nature of the problem and respond accordingly. A mechanism must be developed whereby data is generated and made available on all aspects of the financing of education in the country. The need to develop a system of indicators for measuring goal attainment should be nationally determined. The relevant primary education authorities must build data collection and analysis into their daily operations and use the data more effectively. Information systems need to be established, which transparently provide information to the public in a timely manner. Policies intended for implementing free primary education should be based on accurate data and sound analysis. To achieve universal free and compulsory education for all children, accurate information collection systems need to be implemented; when the data has been collected, a suitable plan can be proposed.⁶⁷

7.2.5 The State's Willingness or Political Commitment

Political will and stronger national leadership are needed for the effective and successful implementation of free and compulsory primary education in Nigeria. As seen in the case of Kenya, following the presidential declaration providing free education, President Kibaki personally promoted the campaign for the right to education. At the policy level, a state commitment to realising every child's right to education is necessary and it is recommended that the state should demonstrate this through the establishment of a sustainable financial framework for achieving that. Policy commitments related to free primary education must be time-bound, action-oriented and include mid-term performance indicators. The Government

⁶⁷ Wilson, Duncan & Melchiorre, Angela, *Analysing education budgets through the lens of human rights: a two-step process*, RTE Framework for budget analysis, <http://r2e.gn.apc.org/sites/r2e.gn.apc.org/files/RTE%20framework%20for%20budget%20analysis.pdf> accessed on 14 July 2014.

needs to explore alternative and innovative ways of increasing the resources available to sustain the free and compulsory primary education programme. The Government should implement laws to protect children from culture and beliefs that are prejudicial to education. They should commit to preserving the dignity of children and engage the public to accept their responsibility to protect them.

Lack of transparency has been one of the major problems of successive governments and attempts to curb incidences of fraud by the establishment of bodies such as the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices and other related Offences Commission (ICPC) seem to have not made the desired impact. With no effective restraints on government behaviour, corruption has remained widespread. In order to bring an end to corruption in the education sector, there should be a 'zero tolerance to corruption' policy. Corruption and the associated lack of transparency and accountability have been obstacles to the adequate funding of the free primary education programme. There should be transparency and accountability on the part of the government.

7.3 Concluding Remarks

This study has endeavoured to establish that claims for free and compulsory primary education in Nigeria can indeed be grounded on international human rights law and the state's international obligation in that regard. The main hindrances that impinge on the implementation of free and compulsory primary education and the various causes that exclude children from receiving primary education in Nigeria has been critically analysed in the thesis. Overall, as with many development efforts, the complete solution to implementing free qualitative compulsory primary education will be an on-going challenge. Nevertheless, to bring Nigeria in compliance with international human rights standards on education, the state needs to be willing to constitutionally and affirmatively recognise the right to education and prioritise its resources purposefully and differently to what is currently the practice. The state would also have to make a firm commitment to the international community for its assistance. This study hopefully makes an important contribution towards a better understanding of the complexities and problems of implementing free and compulsory primary education in Nigeria and at the same time highlights the need and means for its effective implementation. The last sentence should appropriately be that the poor state of primary education in Nigeria is an imperative development-priority that the government of Nigeria needs to address urgently.

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Appendix

KEY DEVELOPMENT PARTNERS FINANCIAL CONTRIBUTIONS TO EDUCATION IN NIGERIA

International donors for free primary education in Nigeria

UNICEF supported the Federal Ministry of Education (FME) to develop the Strategy for the Acceleration of Girls' Education in Nigeria (SAGEN), after Nigeria's inclusion in the UNICEF-supported '25 by 2005' global initiative in 2003. This national FME/UNICEF initiative then evolved into SAGEN+ in early 2004, with support from other major international development partners. The Girls' Education Project (GEP) evolved from a major partnership between UNICEF, the UK's Department for International Development (DFID), and the Government of Nigeria. It has become the largest DFID/UNICEF partnership in the world with the aim of boosting girls' participation in Northern Nigeria, where it is being implemented in six states (Bauchi, Sokoto, Jigawa, Katsina, Borno and Niger). Currently, in close collaboration with DFID, UNESCO Paris and the MDG support Team (UNDP New York), UNICEF is supporting the Federal Ministry of Education and state governments in developing well-costed sector plans that focus on the issues affecting girls' education. (Source: *UNESCO National Education Support Strategy (UNESS) FOR NIGERIA 2006-2015*, Abuja, August 2008 *ED/ESB/EPS/2008/UNESS/NGA/H/1*) (Also available in; *Education: Sector Results Profile* <http://www.worldbank.org/en/results/2013/05/06/education-sector-profile>)[accessed 21 April 2015])

Table of World Bank's State Education Program Investment Project (SEPIP) in Nigeria primary education. (Source: www.worldbank.org/projects/P122124/nigeria-state-education-program-investment-project?lang=en/ [accessed 21 April 2015])

Project Title	Country	Project ID	Commitment Amount	Status	Approval Date
Nigeria - State Education Program Investment Project	Nigeria	P122124	\$150m	Active	March 26, 2013
Community and Social Development Project	Nigeria	P090644	\$200m	Active	July 1, 2008
Nigeria State Education Sector Project	Nigeria	P096151	\$65m	Closed	April 26, 2007
Community-based Poverty Reduction Project Supplemental	Nigeria	P102966	\$25m	Closed	February 1, 2007
Niger Delta Community Foundations Initiative	Nigeria	P107166	\$.24m	Closed	September 20, 2005
Universal Basic Education Project	Nigeria	P071494	\$101m	Closed	September 12, 2002
Community Based Poverty Reduction Project	Nigeria	P069086	\$60m	Closed	December 20, 2000
Second Primary Education Project	Nigeria	P066571	\$55m	Closed	May 11, 2000
Primary Education Project	Nigeria	P002134	\$120m	Closed	December 13, 1990

Global Partnership for Education (GPE) Integrated Safeguards Data Sheet (Concept Stage) - Nigeria Global Partnership for Education Fund Grant - P143842 (English)

GPE Grants (US\$): **100 million**

KEY AREAS:

Education Sector Plan, Katsina State

Education Sector Plan, Sokoto State

Education Sector Plan, Jigawa State

Education Sector Plan, Kano State

Education Sector Plan, Kaduna State

Nigeria received a grant of US\$100 million in December 2014 to support the five northern states of Jigawa, Kaduna, Kano, Katsina and Sokoto where most of the country's disadvantaged children are located. The grant will focus on improving schools and learning outcomes, inclusion of girls in basic education and robust education sector monitoring and evaluation. The proposals present a set of actions aimed at addressing critical supply-side shortages and demand-side barriers, with a particular focus on the country's North. The total estimated cost of these programs is \$199.4 million per year for three years. (Source: <http://documents.worldbank.org/curated/en/2013/07/18022558/integrated-safeguards-data-sheet-concept-stage-nigeria-global-partnership-education-fund-grant-p143842> [accessed 21 April 2015])

Lagos EKO Project: This project was a four-year World Bank Specific Investment Loan of \$95 million from 2009 through 2013 targeting educational investments in priority areas. The project included a School Development Grant component focused on promoting secondary school effectiveness (cost: \$6.2 million). (Source: *A report series to the UN Special Envoy for Global Education. April 2013 Working Paper.* <http://educationenvoy.org/wp-content/uploads/2013/07/NIGERIA-UNSE-FINAL.pdf>)

Girls' Education Programme (GEP), delivered by UNICEF, which is working to improve girls' access to education and learning in four northern States. It started in 2005 and is now in its third phase (GEP3). Phase 1 (GEP1) ran from 2005 until 2008; Phase 2 (GEP2) ran from 2008 until 2012; and Phase 3 is due to run until 2019. Major areas of expenditure for GEP2

have been: school grants (\$7.2 million), capacity-building for SBMCs (\$6.5 million), teacher development (\$3.0 million) and the Female Trainee Teachers' Scholarship Scheme (FTTSS – \$0.75 million). (Source: *A report series to the UN Special Envoy for Global Education. April 2013 Working Paper.* <http://educationenvoy.org/wp-content/uploads/2013/07/NIGERIA-UNSE-FINAL.pdf> [accessed 21 April 2015])

ESSPIN has also been involved in a wider range of teacher training interventions and support for school improvement. Both programmes have worked with State education institutions to develop their capacity, to prepare sector education plans and to collect data. Major areas of expenditure for ESSPIN have been: school improvement (\$41.5 million), community engagement and accountability (\$22.9 million), State governance of basic education (\$ 10.6 million) and federal governance of basic education (\$9.2 million). (Source: *Development Tracker* <http://devtracker.dfid.gov.uk/countries/NG/projects/> *Education Sector Support Programme in Nigeria (ESSPIN). [GB-1-104200] Project budget£141,384,986. Budget spent to date £103,128,551 (72.94%) Start 14 Jul 2008- End30 Sep 2017).*

In 2010 there was the restructure of the Federal Inspectorate Service through quality control capacity building efforts in collaboration with International Development Partners like UNESCO, World Bank, DFID, etc., to address the falling standard in teaching and low learning achievements among pupils. This was designed to enhance competences of teachers and pedagogical skills. The Inspectorate service is therefore enhanced to develop a framework to guide quality assurance at the primary and secondary levels of education. (Source: *DFID's Education, Programmes in Nigeria available at*; <http://icai.independent.gov.uk/wp-content/uploads/2010/11/ICAI-Nigeria-Education-report.pdf> [accessed 21 April 2015]).